(24)

No. 96-827-CFX
Status: GRANTED

Title: Leonard Rollon Crawford-El, Petitioner
v.
Patricia Britton

Docketed:
November 26, 1996

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Schember,Daniel M.

Counsel for respondent: Reischel,Charles L.

40 printed copies ea. pet & appd

Entry	Date	Note	Proceedings and Orders
1	Nov 25 1996	G	Petition for writ of certiorari filed. (Response due January 17, 1997)
2	Nov 25 1996		Appendix of petitioner filed.
4	Dec 23 1996		Order extending time to file response to petition until January 14, 1997.
5	Jan 15 1997		Order further extending time to file response to petition until January 17, 1997.
6	Jan 17 1997		Brief of respondent Patricia Britton in opposition filed.
7	Jan 29 1997		DISTRIBUTED. February 14, 1997 (Page 38)
8	Feb 18 1997	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	May 20 1997		REDISTRIBUTED. June 5, 1997 (Page 1)
10	May 20 1997		Brief amicus curiae of United States filed.
12	Jun 9 1997		REDISTRIBUTED. June 12, 1997 (Page 14)
13	Jun 16 1997		Petition GRANTED. SET FOR ARGUMENT December 1, 1997. **********
15	Jul 10 1997		Order extending time to file brief of petitioner on the merits until August 14, 1997.
16	Jul 28 1997		Joint appendix filed.
24	Aug 14 1997		Brief of petitioner Leonard Rollon Crawford-El filed.
31	Aug 14 1997		Brief amicus curiae of William G Moore filed.
32	Aug 14 1997		Brief amici curiae of American Civil Liberties Union, et al. filed.
18	Aug 19 1997		Order extending time to file brief of respondent on the merits until September 27, 1997.
19	Sep 24 1997		Order further extending time to file brief of respondent on the merits until October 2, 1997.
20	Sep 29 1997		Brief amici curiae of J. Michael Quinlan and Loye Miller filed.
33	Sep 30 1997		Brief amici curiae of Missouri, et al. filed.
21	Oct 1 1997		Brief amicus curiae of United States filed.
22	Oct 2 1997		Brief of respondent Patricia Britton filed.
23	Oct 17 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Oct 27 1997	G	Application (A97-310) to extend the time to file a reply brief from November 3, 1997 to November 10, 1997 by petitioner, submitted to The Chief Justice.
26	Oct 28 1997		Application (A97-310) granted by the Chief Justice

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No. 96-827-CFX

Entry	Date	Note	Proceedings and Orders
			extending the time to file until November 10, 1997.
27	Nov 3 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
30	Nov 6 1997		CIRCULATED.
28	Nov 10 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals and U.S. District Court, for the District of Columbia.
29	Nov 10 1997	X	Reply brief of petitioner Leonard Rollon Crawford-El filed.
34	Nov 21 1997	G	Motion of respondent for reallocation of oral argument time. filed.
35	Dec 1 1997		Motion of respordent for reallocation of oral argument time. GRANTED. to be divided as follows: 20 minutes for respondent and 10 minutes for the Solicitor General as amicus curiae.
36	Dec 1 1997		ARGUED.

(1)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November 25, 1996

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QUESTIONS PRESENTED

1. In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by "clear and convincing" evidence?

2. In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason for the act was unconstitutional?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Leonard Rollon Crawford-El, plaintiff-appellant, and Patricia Britton and the District of Columbia, defendants-appellees.

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TABLE OF AUTHORITIES

Cases:

Other Authorities:

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, appear in the appendix ("App.") at 1a-95a and are reported at 93 F.3d 813. The district court's opinion dismissing petitioner's complaint, App. 115a-141a, is reported at 844 F. Supp. 795. The district court's opinion denying reconsideration, App. 110a-114a, is reported at 863 F. Supp. 6.

The opinion of the court of appeals on respondent's interlocutory appeal appears at App. 145a-160a. It is reported at 951 F. 2d 1314.

Other opinions and orders entered in the case are unreported.

JURISDICTION

The judgment of the court of appeals was entered August 27, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Crawford-El, a District of Columbia prisoner, filed a complaint in the district court under 42 U.S.C. § 1983 alleging, *inter alia*, that respondent Britton, a District of Columbia Department of Corrections official, retaliated against him for his exercise of First Amendment rights.[1] Petitioner's First Amendment retaliation claim against Britton, the only claim addressed by the *en banc* Court of Appeals, is the only claim at issue in this petition.[2]

Facts

The district court stated the First Amendment retaliation claim against Britton as follows:

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

[2] The appellate court's disposition of petitioner's First Amendment retaliation claim against the District of Columbia was entirely in petitioner's favor. App. 96a-99a. Petitioner does not seek review of the appellate panel's rejection of his other claims. App. 100a-106a.

> Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

App. 126a. In support of this claim petitioner's verified complaint reported specific incidents in which respondent manifested her knowledge of petitioner's First Amendment activity, her hostility toward him on account of it, and her retaliatory intent. As the district court noted:

> (1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)
>
> (2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the

correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him to see what he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She [attempted to place him in restrictive confinement,] threatened to make life hard for him in jail any way she could [for as long as he was incarcerated, and had him transferred to another facility]. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion [a December 1988 airplane trip transferring Crawford-El and others to Washington State] that prisoners like Crawford-El "don't have any rights." [She made this remark in response to complaints by Crawford-El and other prisoners on the airplane that an officer's videotaping of them handcuffed and chained violated their privacy.] (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against

the prison system" and quoted Crawford-El to that effect ["What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds"], Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

App. 129a-130a (district court opinion) and App. 178a-180a (additional details stated in the Fourth Amended Complaint).

During the six months following the December 1988 transfer to Washington State, Crawford-El and several other prisoners submitted to the D.C. Mayor letters noting their intent to sue the District of Columbia over the videotaping that Britton had allowed during the transfer. App. 181a.

Soon thereafter, in July 1989, Britton told Washington State authorities to seize and send to her office in the District of Columbia all of the transferred prisoners' property, because the prisoners were to be moved again. App. 181a-182a. During the next several weeks, prison officials sent Crawford-El to various facilities, and then to the federal prison in Marianna, Florida. During this period Crawford-El wrote to Britton, and spoke with her in person and by telephone, repeatedly telling her that he needed the legal materials she had seized. App. 183a-185a. Britton, however, diverted Crawford-El's property outside prison channels to Crawford-El's brother in law, Jesse Carter, whom Crawford-El had not authorized to receive it. App. 184a-185a. She told Carter that Crawford-El "should be happy she did not throw it in the trash." App. 186a.

Because Britton had diverted Crawford-El's property outside prison channels, federal prison officials in Marianna initially refused to allow Crawford-El to receive it when he had his mother mail it to him at his own expense. App. 188a.

To receive his property, Crawford-El had to submit a grievance, which caused federal prison officials to become hostile toward him. *Id.* He finally received his property in February 1990, over six months after Britton had seized it. *Id.*

District Court Opinion

The district court held that

> [a] jury might reasonably infer from [the complaint's] allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker."

App. 131a. The district court also held that

> [b]ecause Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

App. 127a. The district court nonetheless dismissed this claim. The court held the complaint failed to plead "direct" evidence of Britton's unconstitutional intent, as required by circuit precedent applicable at the time. App. 131a.

***En Banc* Appellate Opinions**

The *en banc* Court of Appeals unanimously discarded the circuit's previous direct evidence rule. App. 11a-12a, 44a, 58a, 72a, 78a. Five members of the court, however, decided that Crawford-El must prove Britton's unconstitutional intent by "clear and convincing" evidence, in order to overcome her qualified immunity. App. 3a (opinion of Williams, J., in which three other judges joined); App. 58a (opinion of Ginsburg, J.). These five judges maintained that the evidence recited in

Crawford-El's verified complaint was not clear and convincing and that Britton would be entitled to summary judgment unless Crawford-El presented additional evidence meeting that standard. App. 34a, 71a. Judge Williams's opinion said Crawford-El should be required to present this evidence without being allowed any discovery. App. 3a. Judge Ginsburg's opinion would allow discovery if petitioner showed a "reasonable chance" that discovery would produce clear and convincing evidence of unconstitutional intent. App. 58a-60a.

Judge Silberman urged a different test. He said that an official who *asserts* a legitimate justification for a challenged act should be entitled to qualified immunity if the asserted justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason was unconstitutional. App. 46a-50a.

Five members of the court rejected both the "clear and convincing" evidence standard and Judge Silberman's approach. They said the qualified immunity doctrine does not alter a plaintiff's burden of proof on the merits and that the evidence recited in petitioner's complaint entitles him to trial. App. 93a-94a.

REASON FOR GRANTING THE WRIT

The *en banc* majority's broad and unprecedented rulings that qualified immunity alters the burden of proof in cases of retaliation for exercise of First Amendment rights--five judges requiring "clear and convincing" evidence of unconstitutional intent, one judge requiring proof that a defendant's asserted justification is unreasonable, though evidence shows it was not the actual motive--conflict with the decisions of ten circuits and are incompatible with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Chief Judge Edwards, joined by four other judges, noted the significance of the rulings rendered by their six opposing colleagues:

> Without any directive from Congress or mandate from the Supreme Court, my colleagues run roughshod over the Federal Rules of Civil Procedure and invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would *never* be able to survive a defendant's assertion of qualified immunity. This result is both unfathomable and astonishing.

App. 78a (emphasis in original). Chief Judge Edwards pointed out the conflict between the views of the six judges and "the law of every other court of appeals in the nation," App 80a:

> [I]f a "clear and convincing" evidence standard were truly necessary to vindicate defendants' . . . [qualified immunity], as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed, although nearly every other federal appeals court in the nation has addressed the precise issue that we face

> today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view this case differently.

App 87a-88a (emphasis in original) and n. 7 (collecting cases from ten circuits).

Chief Judge Edwards also demonstated the incompatibility of his colleagues' opposing views with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a qualified immunity case in which "the plaintiff alleged that the defendants had violated his First Amendment rights by dismissing him in retaliation for testifying before a congressional committee," App. 87a:

> A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed by the Supreme Court, and (contrary to the suggestion in Judge Williams's opinion) *Harlow* itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in *Harlow* stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n.35 (internal quotations omitted). Thus, nothing in *Harlow* gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.

Chief Judge Edwards showed how "firm application of the Federal Rules of Civil Procedure" is "more than adequate to dispose of unmeritorious claims" prior to trial "without appellate judges taking it upon themselves to invent new evidentiary standards designed to address particular categories of cases." App. 85a. He cited the district court's

power "to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity." App. 83a. This kind of initial discovery enables the defendant quickly to determine, before answering any discovery by the plaintiff, whether to seek summary judgment based on plaintiff's inability to prove unconstitutional intent. Under Rule 56, F. R. Civ. P., as Chief Judge Edwards also noted, a plaintiff responding to such a summary judgment motion must either present evidence of unconstitutional intent or "show a reasonable likelihood" that allowing discovery by the plaintiff "will uncover evidence" proving that element of the claim. App 84a. The district court's power to limit all discovery to "the needs of the case," in order to avoid undue "burden or expense," also cited by Chief Judge Edwards, App. 83a and n.5 (quoting Rule 26(b)(2)(iii), F. R. Civ. P.), can ensure that any discovery allowed under Rule 56(f) is tailored to the reasonable likelihood the plaintiff has shown. Chief Judge Edwards wrote:

> These procedures are part of the standard apparatus provided by the Federal Rules to enable trial judges in civil suits to differentiate meritorious claims from frivolous ones, and the Supreme Court has *never* suggested that this same apparatus is somehow inadequate when it comes to the particular immunity concerns expressed in *Harlow*.

App. 85a. Chief Judge Edwards noted, moreover, that developments in summary judgment law since *Harlow* have eliminated earlier difficulties in obtaining summary judgment on the issue of subjective intent:

> [A]s Justice Kennedy has pointed out, the objective standard for qualified immunity articulated in *Harlow* was based on the fact that the standards for summary judgment at the time "made it difficult for a defendant to secure summary judgment regarding a factual question such as

> subjective intent." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Now, however, "subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

App. 85a.

Judge Williams argued that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), supported his view that clear and convincing evidence of unconstitutional intent should be required in this case, but Chief Judge Edward pointed out the error in this reasoning:

> [M]y colleagues' attempt to justify a clear and convincing evidence standard by reference to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is in vain. In that case, nothing less than the First Amendment's guarantee of freedom of the press was at stake, and the Court concluded that this vital interest, enshrined in the Bill of Rights, justified a heightened evidentiary burden. *See, e.g., id.*, at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."). Given that there is no analogous *constitutional right* protecting public officials from lawsuits, this case cannot possibly qualify as a "cognate" area of law.

App. 91a-92a.

Chief Judge Edwards's conclusion succinctly shows why review by this Court is warranted:

> Given the lack of any Supreme Court decision indicating that a "clear and convincing" standard can or should be invented by judges and overlaid onto the Federal Rules of Civil Procedure, the result proposed by the judges who view this case differently suggests an extraordinary use of judicial authority. One would have thought that the outcome they propose would be anathema to judges who advocate a philosophy of judicial restraint, particularly when the more prudent course is to insist on a firm application of the Federal Rules until such a time as the Supreme Court commands us to do otherwise, or an amendment is made either to the Federal Rules or to section 1983 itself.
>
> * * *
>
> [A]s Justice Kennedy recently pointed out, courts must be cautious about "devising limitations to a remedial statute, enacted by Congress, which "on its face does not provide for *any* immunities.' " *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). I therefore find it incredible that some members of this court seek to create new rules that would effectively render impossible all ... civil rights actions [against government officials] that turn on the[ir] intent.... Until the Supreme Court finally resolves the question once and for all, it appears that this circuit might sit alone among all the federal courts of appeal in its approach to this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

November 25, 1996

No.

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OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 20, 1996 Decided August 27, 1996

No. 94-7203

LEONARD ROLLON CRAWFORD-EL,
APPELLANT

v.

PATRICIA BRITTON AND THE DISTRICT OF COLUMBIA,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 89cv03076)

Daniel M. Schember argued the cause and filed the briefs for appellant.

Charles L. Reischel, Deputy Corporation Counsel, argued the cause for appellees. With him on the brief were *Charles F. Ruff*, Corporation Counsel, and *Edward E. Schwab*, Assistant Corporation Counsel. *Garland Pinkston, Jr.*, Principal Deputy Corporation Counsel and *Erias A. Hyman*, Counsel, entered appearances.

Stephen W. Preston, Deputy Assistant Attorney General, United States Department of Justice, argued the cause for *amicus curiae* the United States. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *Barbara L. Herwig*, Assistant Director, *Robert M. Loeb*, Attorney and *Eric H. Holder, Jr.*, United States Attorney.

Michael L. Martinez and *William J. Dempster* were on the brief for *amici curiae* J. Michael Quinlan and Loye W. Miller, Jr.

Arthur B. Spitzer was on the brief for *amicus curiae* American Civil Liberties Union of the National Capital Area.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* GINSBURG.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Opinion filed by *Chief Judge* EDWARDS, concurring in the judgment to remand.

WILLIAMS, *Circuit Judge*: We decided to hear this case en banc on our own initiative in order to resolve continuing disputes as to how a government official's assertion of qualified immunity, as a defense to a damage action for a constitutional tort, may affect pleading and summary judgment standards where the unconstitutionality of the official's act turns on his motive. Our inquiry is framed by the

competing goals described by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982)—vindicating constitutional rights but at the same time protecting officials from exposure to discovery and trial that would unduly chill their readiness to exercise discretion in the public interest. We here discard our former solution—a requirement that the plaintiff allege "direct" evidence of unconstitutional motive. See, e.g., *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991). But we read *Harlow* as calling for alternative rules to protect officials. First, we think *Harlow* allows an official to get summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue. Second, we believe that unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant.

* * *

Crawford-El is a prisoner in the District of Columbia's correctional system serving a life sentence for murder. He filed the present lawsuit in 1989, claiming that the individual defendant, Patricia Britton, a D.C. correctional official, and the District of Columbia had misdelivered boxes belonging to him containing legal papers, clothes and other personal items, thereby violating his constitutional right of access to the courts. When Britton moved for dismissal and for summary judgment on grounds of qualified immunity, the district court denied the motion and Britton appealed. We reviewed Crawford-El's allegations under a "heightened pleading" requirement, insisting that the plaintiff in such a case advance "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds."

Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991) (quotations omitted). By this standard we found his claims wanting. Because we thought that our heightened pleading doctrine had become clearer in ways adverse to plaintiff since his pleading, however, we remanded the case to the district court in case that court, in its discretion, should decide to permit repleading. *Id.* at 1322.

On remand the district court indeed granted permission, and Crawford-El filed his Fourth Amended Complaint. There he repleaded the access-to-courts claim, but without adding material to fill the gap identified in our first opinion. He also pleaded a due process claim. The district court dismissed both claims, and a panel of this court affirmed. *Crawford-El v. Britton*, No. 94-7203, mem. op. at 1-2 (D.C. Cir. Nov. 28, 1995). In addition, Crawford-El charged that the defendants' alleged misdelivery of his belongings was in retaliation for various feisty communications with the press and thus in violation of the First Amendment. (This claim had initially appeared in his briefing on the first round in this court. See *Crawford-El*, 951 F.2d at 1316.) The district court granted the defendants' motion to dismiss the First Amendment claim as well, saying that the complaint did not allege "direct" evidence of unconstitutional motivation and citing *Siegert v. Gilley*, 895 F.2d 797, 800-802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226, 231 (1991), our court's most emphatic statement of the "direct" evidence requirement. *Crawford-El v. Britton*, No. 89-3076, mem. op. at 14-15 (D.D.C. Feb. 15, 1994). After affirming dismissal of the first two claims, the panel suggested, and the court *en banc* agreed, that the dismissal of the First Amendment retaliation claim should be heard by the court *en banc*.[1]

---

[1] Our order for rehearing *en banc* relates only to the qualified immunity raised by plaintiff's action against Britton. But the District of Columbia is, as noted in the text, still in the case.

The background law on subjective motivation and qualified immunity.

In *Harlow v. Fitzgerald* the Court reformulated its test for officials' qualified immunity in constitutional tort actions. For acts to which qualified immunity may apply,[2] it held that the plaintiff can prevail only by showing not just that there was a violation, but that defendant's acts violated "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. It thus *excluded* liability where there was a violation (but not of a right so clearly established that a reasonable person would

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The district court had dismissed it as a defendant, but since in his successive amended complaints Crawford-El repeatedly named the District as a defendant and the District did not object, the district court held that the District had waived a law-of-the-case argument and therefore reinstated it as defendant. *Crawford-El v. Britton*, No. 89-3076, mem. op. at 1 n.1 (D.D.C. Feb. 15, 1994). Because Crawford-El's claims against the District do not concern the questions for which we granted rehearing en banc, they are to be resolved by the panel.

Another extant part of the complaint is a pendant District law claim for conversion of Crawford-El's property. The survival of this claim (in the federal courts) turns on whether, after the remand ordered here, there is any federal claim to which it may be appended.

[2] The qualified immunity defense is unavailable for ministerial acts, see *Harlow*, 457 U.S. at 816; see also *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984), and unnecessary for acts for which the officer enjoys absolute immunity, see *Harlow*, 457 U.S. at 807.

have known of it) even when the official acted "with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

The Court was quite explicit as to the purpose of its change. It noted that claims against officers necessarily included ones "against the innocent as well as the guilty," and that among the "social costs" of such suits were "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. Last but not least, it invoked Judge Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), which had argued that the fear of being sued would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." 177 F.2d at 581 (quoted in *Harlow*, 457 U.S. at 814). It saw the inclusion of liability based on subjective malice as greatly increasing all these costs. Because such liability opened up a wide field of inquiry, often with "no clear end to the relevant evidence" bearing on the official's "experiences, values, and emotions," and typically not susceptible of disposition by summary judgment, its resolution was "peculiarly disruptive of effective government." *Id.* at 816-17. Most notably for our purposes, the Court underscored the burdensome character of *discovery* flowing from such liability. See *id.* at 817 (speaking of the "broad-ranging discovery" that would result from allowing such claims); *id.* at 818 (speaking of the resulting "broad-reaching discovery"). Moreover, the Court said, such liability would thwart what had been its assumption in its earlier definition of qualified immunity—that "[i]nsubstantial lawsuits" would be quickly terminated." *Id.* at 814 (quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978)). Accordingly the Court held that qualified immunity could be penetrated only on a showing of *objective*

unreasonableness—the now familiar requirement of "clearly established" rights. *Id.* at 818. Henceforth, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The Court later described *Harlow* as having "purged qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985); see also *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

In fact, under the decisions of every circuit court addressing the matter, *Harlow* has not accomplished the stated purpose. This circuit and others have understood *Harlow* to allow inquiry into subjective motivation where an otherwise constitutional act becomes unconstitutional only when performed with some sort of forbidden motive (such as, here, the claim that Britton's decisions routing Crawford-El's parcels were driven by a desire to penalize his exercise of free speech rights). See, e.g., *Siegert v. Gilley*, 895 F.2d at 800-801; *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1431 (D.C. Cir. 1987); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991); *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994); cf. *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (noting this court's and others' decisions to allow unconstitutional motive claims in areas other than national security). Even though it has entailed many of the "social costs" of inquiry into subjective motivation stated in *Harlow*, courts have concluded that the vindication of constitutional rights calls for damages liability—often the only device available for such vindication. *Halperin*, 807 F.2d at 186.

In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), we recognized the problem, noting that a plaintiff's claim of unconstitutional motive could easily lead to discovery and trial, with no hope of success, and the "result would be precisely the burden *Harlow* sought to prevent." *Id.* at 29. We decided that for claims of which unconstitutional intent was an essential part, "nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* This did not speak explicitly to the issue of whether a plaintiff must surmount any particular burden in order to secure discovery. But in *Martin v. D.C. Metropolitan Police* we specifically took the view that the *substantive* characteristics of cases involving qualified immunity and unconstitutional motive required deviation from garden-variety application of the Federal Rules of Civil Procedure's liberal pleading and discovery rules. We quoted at length and with evident approbation from a Fifth Circuit decision:

> What is a federal trial judge to do? One thing he may not do: face it as just another lawsuit in which the notice pleading's liberal policy of F.R. Civ. P. 8 counts on pre-trial discovery to ascertain the factual basis for the claim[.] ... Allowing pretrial depositions, especially those taken adversely of the government official to ferret all of his actions and the reasons therefor ... would defeat and frustrate the function and purpose of the ... immunity[.] ... [U]se of liberal discovery to establish the basis of a claim is directly at odds with the Court's direction in *Harlow* that government officials entitled to immunity [are to] be freed

> from the burdens, the stress, the anxieties and the diversions of pretrial preparations.

Martin, 812 F.2d at 1437 (R.B. Ginsburg, J.) (quoting *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985)) (footnotes omitted).

Our holding in *Martin* both imposed a "direct evidence" requirement and related it to the problem of discovery. To get to trial, we said, a plaintiff must produce "*something more than inferential or circumstantial* support for his allegation of unconstitutional motive. That is, some *direct* evidence [of improper motivation] must be produced...." 812 F.2d at 1435 (emphasis added). But we formulated no explicit rule on discovery. While we quoted *Elliott*'s exhortation about protecting officials from "the burdens, the stress, the anxieties and the diversions of pretrial preparations," we also said that a complete ban on plaintiff's discovery of defendant before resolution of qualified immunity issues on summary judgment might turn the prior decisions allowing plaintiffs to raise claims of unconstitutional motive into an "empty gesture," *id.* at 1437, and that we were "leaving some space for discovery," *id.* We told district courts to employ "with particular care and sensibility their large authority to exercise control over discovery" in order to balance all the concerns properly. *Id.* at 1436-37.[3]

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[3] Then-Judge Ginsburg later observed that in *Martin* the court had "cut back allowable discovery severely, permitting only a sharply limited, precisely defined line of inquiry, and even then, only because of special exigencies in the particular case." *Bartlett v. Bowen*, 824 F.2d 1240, 1245 (D.C. Cir. 1987) (R.B. Ginsburg, J., concurring in denial of rehearing *en banc* in *Martin* and several other cases).

In *Whitacre v. Davey* we read *Martin* to require allegations of direct evidence of unconstitutional motive to survive a motion to dismiss and get discovery, 890 F.2d at 1171 & n.4, but the point was not necessary to the case because the allegations of circumstantial evidence were inadequate even under the less demanding standard of Title VII, see *id.* at 1172. Finally, in *Siegert v. Gilley*, 895 F.2d at 802, we specifically held that "in order to obtain even limited discovery, such [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." The pleading requirement entailed the discovery consequence: if defendant was entitled to dismissal of the case in the absence of specific assertions of direct evidence, there would be no occasion for discovery. Although the Supreme Court granted certiorari on the question whether "a "heightened pleading' standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law," Pet. for Cert. i, quoted in *Siegert v. Gilley*, 500 U.S. 226, 237 (1991) (Marshall, J., dissenting), the Court in fact affirmed on a different, "preliminary" issue, namely its conclusion that plaintiff had failed to allege a constitutional violation at all. *Id.* at 232-35. In *Kimberlin v. Quinlan*, 6 F.3d 789, 793-94 (D.C. Cir. 1993), we applied our "direct evidence" requirement, and denied rehearing *en banc* with a flurry of concurring and dissenting opinions, 17 F.3d 1525 (D.C. Cir. 1994). The Supreme Court granted certiorari, 115 S. Ct. 929 (1995), but then vacated and remanded, 115 S. Ct. 2552 (1995), for consideration in the light of *Johnson v. Jones*, 115 S. Ct. 2151 (1995), which clarified the circumstances permitting an interlocutory appeal from denial of a summary judgment motion by a defendant invoking qualified immunity; we then dismissed the *Kimberlin* appeal. No. 91-5315, 1995 WL 759464 (D.C. Cir. Nov. 8, 1995) (order remanding case to district court).

Because the district court here applied the "direct evidence" rule, mem. op. at 5 n.4, and found Crawford-El's complaint wanting, *id.* at 15-17, the present case calls on us to decide whether the circuit should continue to apply that rule, foreclosing discovery unless the pleadings assert "direct evidence" of illicit motive. We find that question easy, at least if, as we believe, there are adequate alternative means of reconciling *Harlow*'s twin purposes in the context of constitutional torts dependent on the official's having an improper motive. We first address the drawbacks of the "direct evidence" rule, and then consider alternative extrapolations from the logic of *Harlow*.

Deficiencies of the "direct evidence" requirement.

First, the distinction between direct and circumstantial evidence has no direct correlation with the strength of the plaintiff's case. While a perjured claim of having heard a confession of unconstitutional motive would meet the test, a massive circumstantial case would not. See *Siegert v. Gilley*, 500 U.S. at 236 (Kennedy, J., concurring) (rejecting D.C. Circuit's direct/circumstantial test on this ground); *Elliott v. Thomas*, 937 F.2d at 345 (same). Second, the distinction does not appear calibrated in any other way to the trade-offs found determinative by the Court in *Harlow* and qualified immunity doctrine generally. Although the rule presumably did reduce the incidence of motive-related damage suits against officers, we have no reason to think that it did any better as a screen than, say, a random rejection of nine out of every ten claims. The abandonment of circuit precedent *en banc* is of course not to be lightly undertaken. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 875 (D.C. Cir. 1992) (en banc) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). We have noted in contemplating such overrulings that treatment of the issue in other circuits is a factor to be considered. *Id.* at 876. Here, the only courts to consider our

direct evidence rule have rejected it emphatically, see *Elliott v. Thomas*; *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), as have the four Supreme Court justices who have chosen to speak on the matter. *Siegert v. Gilley*, 500 U.S. at 235-36 (Kennedy, J., concurring); *id.* at 245-46 (Marshall, J., with whom Blackmun & Stevens, JJ., concurred, dissenting). Under the circumstances, we think it readily justifiable to overrule our precedents establishing the direct/circumstantial distinction, without even addressing the question whether formulation of the rule as a *pleading* requirement violates the liberal pleading concepts established by the Federal Rules of Civil Procedure. See *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (invalidating heightened pleading requirement invoked by municipal government unit as defense to constitutional tort, as violation of Rules 8 and 9(b), but reserving issue of holding's application to claims against individual government officials).

Alternative protections inferred from Harlow.

In *Harlow* the Supreme Court assumed that it had established principles of officer liability that eliminated the litigation burdens associated with an official's state of mind, or, as it put the point in *Mitchell v. Forsyth*, that it had "purged qualified immunity doctrine of its subjective components." 472 U.S. at 517. For that proposition to be literally true, it would be necessary to reject *any* officer liability for constitutional torts in which the officer's intent is an essential element in rendering the conduct unconstitutional. See *Elliott v. Thomas*, 937 F.2d at 344 (carrying out "the program of *Harlow*" would require imputing to defendants the best intent they could possibly have); see also Silberman Op., *post* (reading *Harlow* to extinguish liability for such torts). As *Elliott* noted, however, that would eliminate any damage remedy even for "egregious wrongdoing." 937 F.2d at 344; see also *Halperin*, 807 F.2d at 186. What, then, does

Harlow suggest are appropriate devices to balance the interest in providing remedies against the interest in protecting officials from the undue litigation burdens, including, as *Harlow* emphasized, discovery itself?

We think the crux of the answer lies at the summary judgment phase of litigation. It divides into two questions: First, what *methods* may plaintiff use to secure evidence to resist the defendant's motion for summary judgment? Second, must plaintiff's evidence substantively meet some *higher standard* than the conventional preponderance test?

1. *Methods available to plaintiff for securing evidence for purposes of summary judgment resolution of qualified immunity.* The primary burdens of litigation occur in discovery and trial. If the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive. After describing its objective test, the Court said, "Until this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. We can protect the sequence apparently insisted upon by *Harlow*—no discovery until there has been at least one cut at the qualified immunity issue—by the straightforward rule that plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive. In his concurring opinion in *Siegert*, Justice Kennedy adumbrated this approach. Observing that "heightened pleading" was inconsistent with Federal Rules of Civil Procedure 8 and 9(b), he said:

> But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. *The substantive defense of immunity controls.*
>
> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.

500 U.S. at 236 (emphasis added).

In *Elliott v. Thomas*, 937 F.2d at 344-46, Judge Easterbrook spelled out the point in more detail. "Unless the plaintiff has the kernel of a case in hand [specific, nonconclusory allegations which establish the necessary mental state], the defendant wins on immunity grounds in advance of discovery." *Id.* at 344-45. Because the substantive law—the law of qualified immunity per *Harlow*—tells the court what is needed for summary judgment, there is no conflict with Rule 56's provision for summary judgment:

> If a rule of law crafted to carry out the promise of *Harlow* *requires the plaintiff to produce* some evidence, and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado.

937 F.2d at 345 (emphasis added). This is, of course, substantially similar in result to the imposition of a "heightened pleading" standard, in that both prevent serious invasion of the defendant's time unless the plaintiff can, without discovery, offer specifics of his case as to defendant's motivation. See, e.g., *Elliott v. Perez*; *Sawyer v. County of Creek*, 908 F.2d 663, 665, 668 (10th Cir. 1990) (noting that

because plaintiff conceded inability to amend complaint without discovery, dismissal would be with prejudice).

Although neither *Elliott* nor Justice Kennedy's concurrence in *Siegert* expressly addressed Rule 56(f), which authorizes the district judge to defer ruling on summary judgment and to provide for depositions and other discovery, the solution flows from their analysis of *Harlow*—its articulation of the *substantive* right of qualified immunity. To allow the plaintiff to engage in discovery, in order to carry his burden of establishing a basis for inferring improper motive, would violate *Harlow*'s determination to protect the official from discovery until the qualified immunity issue has been resolved. Under the Rules Enabling Act, the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), so that any reading of the Rules to trump officials' substantive entitlements is impermissible.

We note that the rule preventing discovery concerning illicit *motivation* does not bar discovery concerning a defendant official's state of mind for other purposes. A claim for damages for an allegedly unreasonable search or seizure will often turn on whether the defendant was in possession of facts that would have led a reasonable officer to suppose he had probable cause or exigent circumstances. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (relevant question in that case was "the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and *the information the searching officers possessed*") (emphasis added). Although the *Anderson* Court appeared to discourage discovery even in that context, see *id.* at 646-47 n.6, we do not understand its message as remotely approaching an absolute bar. Similarly, in *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 788-

89 (7th Cir. 1995), the Seventh Circuit said it would permit discovery to allow a prisoner to identify the proper defendants in an Eighth Amendment case where a defendant would be liable if it were shown that he *knew* plaintiff's cellmate was HIV-positive and had a tendency to rape cellmates, and was responsible for the assignment. The state-of-mind showings the plaintiffs had to make in *Anderson* and *Billman* thus went simply to the defendants' acquisition of particular facts, not the broader inquiry into motivation at stake here.[4] Our case would be equivalent if Crawford-El had simply to show that Britton knew the boxes contained legal papers (or something else of value to plaintiff) and was responsible for their transfer.

2. *Requirement of clear and convincing evidence*. There still remains the question whether the defendant's entitlement to summary judgment on qualified immunity before plaintiff's discovery achieves an adequate balance in light of *Harlow*'s purposes. Conventional summary judgment principles supply some protection to defendants. Plaintiff must do better than "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to block summary judgment for defendant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

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[4] Thus, unlike Judge Edwards, see Edwards at 7-8, we do not see any schism in the Seventh Circuit, between *Elliott*'s requirement that plaintiff himself supply evidence of defendant's illicit motivation in order to withstand defendant's summary judgment motion, 937 F.2d at 345, and *Billman*'s allowing plaintiff discovery to develop evidence that defendant was aware of facts that would, if known to defendant, render his conduct violative of the 8th Amendment.

Here defendants argue that that is not enough. They propose a special standard, which they frame as a requirement of "strong evidence." The United States as amicus proposes a similar heightened standard; framing the proposal in terms of pleading, it suggests that plaintiff be required to "plead specific facts giving rise to a strong inference of the alleged improper motive before any discovery will be permitted."[5]

Two factors make us believe that the standard protection of summary judgment (coupled with the limit on discovery stated above) leave an exposure to both liability and litigation that is impossible to square with *Harlow*. First, unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove. *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir. 1992) (citing *Hollymatic Corp. v. Holly Systems, Inc.*, 620 F. Supp. 1366, 1369 (N.D. Ill. 1985) ("[F]raud, focusing as it does on a subjective state of mind, can be very easy to allege and very difficult to prove or disprove.")); see also *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) (rationale behind heightened pleading requirement for fraud in Rule 9(b) is preventing improvident charges of wrongdoing and strike suits); Charles A. Wright & Arthur R. Miller, 5 *Federal Practice and Procedure* § 1296 (1990) (same). Even cut off from the fruit of depositions and other discovery against the defendant and her colleagues, plaintiff will often be able to depict a selective pattern of decisions that, without evidence of a more complete set of comparable ones, and extensive explanation by one or more

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[5] Judge Edwards is correct that neither the Solicitor General nor the government defendants advocated the "clear and convincing" standard, see Edwards Op. at 11, but the difference between that and what the Solicitor General did advocate appears to be mainly that his proposed standard is formulated in language that has much less experience and tradition behind it.

decision-makers, will look fishy enough that a jury could reasonably find illicit motive by a preponderance.

Second, *Harlow* plainly views the costs of error in the grant or denial of relief in such cases as asymmetrical. The decision expressed a strong concern about the social costs of damages litigation against officials—namely (to repeat), the conventional costs of litigation, the diversion of the officials' time, deterrence of able persons from even accepting public office, and the chilling of officials' readiness to exercise discretion in the public good. Because of those costs the Court adopted a rule categorically denying recovery where, if the truth could be fully known, there was a malicious perpetration of a constitutional violation (but not a violation of a right so clearly established that a reasonable person would have known he was crossing the line). This can only mean that the Court regarded at least some kinds of officer liability (those turning on subjective intent) as ones where, everything else being equal, the social costs of erroneously denying recovery in some cases were exceeded by the combined social costs of (1) litigating and (2) erroneously affording recovery in other cases.

A standard solution to such a difference in costs between two types of error is to adjust the standard of proof. Criminal law is the best known example, where it is seen as better to allow quite a few actually guilty defendants—perhaps many, in fact—to go free than for one innocent one to be convicted; ergo, the reasonable doubt standard. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); cf. 4 William Blackstone, *Commentaries* *358 (explaining two-witness rule in perjury cases). But civil law contains frequent applications of a more modest tilt, a requirement that the party seeking to mobilize the state to alter the status quo prove his case by clear and convincing

evidence. Courts have set that hurdle in deportation proceedings, *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966); denaturalization proceedings, *Schneiderman v. United States*, 320 U.S. 118, 123 (1943); civil commitment proceedings, *Addington v. Texas*, 441 U.S. 418, 423 (1979); cases involving termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); defamation suits against public figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); and a variety of other civil cases such as civil fraud, lost wills, and oral contracts to make bequests, see *Woodby*, 385 U.S. at 285 n.18 (citing 9 *Wigmore on Evidence* § 2498 (3d ed. 1940)). Although we understand the specific standards urged by defendants and the United States ("strong evidence" and "strong inference") to be aimed at similar concerns, we do not pursue them because of their uncertainty compared to the familiar clear and convincing standard.[6]

We pause to note a relationship between (1) the costs of litigation regardless of outcome and (2) a different societal valuation of the two types of error. Where the social costs of litigation itself are exceptionally high, assuming no difference at all in societal valuation of the two different types of error, that *alone* could be a ground for a tilt against the party seeking to alter the status quo. Because a reduction in the probability of success reduces the incentives to bring suit (everything else being equal), such a tilt will automatically reduce the aggregate costs of the affected class of lawsuits—at some cost in increasing the number of good

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[6] The "strong inference" standard is used by the Second Circuit in securities fraud cases under Fed. R. Civ. P. 9(b). See, e.g., *Acito v. Imcera Group*, 47 F.3d 47, 52 (2d Cir. 1995); *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1127-28 (2d Cir. 1994).

claims that go uncompensated.[7] Accordingly, imposition of a clear and convincing standard may imply (1) simply a perception that the type of litigation involves unusually high costs (so that a tilt against its initiators will decrease its incidence, the court regarding the increase in denials of recovery as an acceptable cost), or (2) a conclusion that errors in defendants' favor are independently to be preferred to errors in plaintiffs' favor, or (3) some combination of the two. If the *holding* of *Harlow* represented nothing else, it surely manifested either the first or third of those possibilities; after all, in one stroke it destroyed an entire group of claims for what was, by hypothesis, unconstitutional behavior.

The cases applying a clear and convincing evidence standard frequently allude to the second of these rationales (which of course is encompassed in the third). As the Court observed in *Addington*, a standard of proof both "indicate[s] the relative importance attached to the ultimate decision" and also "serves to allocate the risk of error between the litigants." 441 U.S. at 423; see also *Santosky*, 455 U.S. at 755 (citing *Addington*); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (same). The Court illustrated this rationale in *New York Times Co. v. Sullivan*, quoting a Kansas Supreme Court case to support its actual malice standard: " "[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.' " 376 U.S. at 281 (quoting *Coleman v. MacLennan*, 78 Kan. 711, 724 (1908)). The Supreme Court has used such

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[7] Of course, many plaintiffs in civil rights actions against public officials know that their chances of success on the merits are minimal and may be motivated by purposes other than achieving that success. The tilt makes it easier for district judges to end such cases quickly, thereby reducing the burdens on the defendant and the court that concerned the Court in *Harlow*.

terms in discussing special gradations of proof. *Woodby*, 385 U.S. at 284-85; *Addington*, 441 U.S. at 423-25; *Santosky*, 455 U.S. at 755.

In developing the *New York Times* rule of clear and convincing evidence, the Court explicitly drew on the reasoning of *Barr v. Matteo*, 360 U.S. 564, 571, 575 (1959), in which it had extended and explicated absolute officer immunity for certain types of official acts. 376 U.S. at 282. It recited *Barr*'s entire litany of social costs of officer liability—essentially those later invoked in *Harlow*—as a parallel justifying its adoption of the *New York Times* rule. *Id.* If a heightened standard of proof—clear and convincing evidence—was a sound remedy in the area of public figure defamation, we think it is equally so in the cognate area of officer damage liability for constitutional torts based on improper motive.

Heightened standards of proof of course apply equivalently at summary judgment and at trial, as a seamless web. In *Anderson v. Liberty Lobby, Inc.* the Court made clear that just as the reasonable doubt standard for criminal trials implies its use in judicial evaluation of motions for acquittal, the clear and convincing standard for trial of malice for purposes of public figure defamation must imply "a corresponding effect" for motions for a directed verdict and for summary judgment. 477 U.S. at 252-54.[8]

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[8] Once the plaintiff has come forward with evidence that a jury could regard as clear and convincing proof of the defendant's unconstitutional motive, his access to discovery on all issues (including motive) would be, in the view of the judges in the plurality, a matter for the district court to determine as in ordinary civil litigation. In other words, although the plaintiff would get no discovery unless he had in hand evidence that would support a jury finding in his favor

What of the pleadings? The label "heightened pleading" for special requirements for constitutional torts involving improper motive was always a misnomer. A plaintiff is not required to anticipate the defense of qualified immunity in his complaint, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), and under the Federal Rules of Civil Procedure is required to file a reply to the defendant's answer only if the district court exercises its authority under Rule 7(a) to order one. At stake has always been the ability of the plaintiff to inflict on the defendant officer liability and the serious burdens of litigation itself—discovery and trial. Although we understand the arguments of the court in *Schultea v. Wood*, 47 F.3d 1427, 1432-34 (5th Cir. 1995), supporting a rule that where qualified immunity is raised in a case involving illicit motive the district court's discretion *not* to order a reply "is narrow indeed," we do not see why the limit on discovery and the standard of proof discussed above would not adequately fulfill the implications of *Harlow*. Of course court-ordered replies and motions for a more definite statement under Rule 12(e) may simplify and speed the process, but we do not see that protection of substantive rights requires any special rules.

We note briefly the argument of the American Civil Liberties Union as amicus, drawing on the recent decision in *Johnson v. Jones*, 115 S. Ct. 2151 (1995). In *Mitchell v. Forsyth* the Supreme Court applied the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), to hold that immediate appeal was available for "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." 472 U.S. at 527. In *Johnson* the Court expressly limited *Mitchell* to pure issues of law, *id.* at 2156, such as the determination that a set

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on the motive issue, if he did have that evidence he could use discovery to obtain additional evidence that might help him win the battle of persuasion at trial.

of given facts constituted a violation of clearly established law, *id.* at 2159. This made clear that appeals from denials of summary judgment were not available for questions of evidentiary sufficiency. *Id.* at 2156; see also *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996) (explicating *Johnson*). The Court was especially concerned that allowing interlocutory appeals of factual questions about intent "may require reading a vast pretrial record, with numerous conflicting affidavits, depositions and other discovery materials" and would result in unjustifiable delay for the plaintiff. *Johnson*, 115 S. Ct. at 2158.

The ACLU argues that *Johnson* concluded that where a dispute about material facts exists in a constitutional tort case, "the goal of shielding defendants from discovery or trial yields to the usual goals of resolving cases on their merits through normal procedures." But *Johnson* is not remotely so sweeping. As the Court observed in *Behrens*, "Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact." 116 S. Ct. at 842. The question for purposes of immediate appealability is whether the point at issue is mere sufficiency of the evidence or "more abstract issues of law." *Johnson*, 115 S. Ct. at 2158; *Behrens*, 116 S. Ct. at 842. The Court never addressed (or even hinted at) any adjustment in the summary judgment standards for constitutional torts involving improper motive under *Harlow*. Indeed, no court of appeals thus far has abandoned its special standards in constitutional motive cases in light of *Johnson*. See, e.g., *Moore v. Valder*, 65 F.3d 189, 195, 196 & n.13 (D.C. Cir. 1995); *Morin v. Caire*, 77 F.3d 116, 121 (5th Cir. 1996); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995); *Gehl Group v. Koby*, 63 F.3d 1528, 1535 (10th Cir. 1995). And, of course, this court recognized the distinction drawn in *Johnson before* that case was decided, see *Crawford-El v. Britton*, 951 F.2d at 1317 (no immediate

review available for district court's treatment of an "I didn't do it" defense on summary judgment); see also *Johnson*, 115 S. Ct. at 2154 (listing *Crawford-El* among the decisions on the side that *Johnson* found correct), yet nonetheless applied special standards. More generally, so far as we know, most if not all trial court proceedings over claims requiring clear and convincing proof plod along without any application of the collateral order doctrine. Limits on the reach of that doctrine of course mean delay in the correction of trial court error and a resulting increased exposure of officials to some adverse consequences, but we do not see why every fine-tuning that limits the immediacy of appeal should connote some anti-defendant shift in the principles to be applied by the district court.[9]

Application to Crawford-El

As we have seen, the district court *dismissed* Crawford-El's Fourth Amended Complaint under the "heightened pleading" requirement. If dismissal of the complaint were the sole means available to protect defendants from discovery barred by *Harlow*, then we would confront the issue of whether Rule 8's minimalist standard ("a short and plain statement of the grounds") could be applied to the sort of complaints here at issue without violating 28 U.S.C. § 2072(b)'s ban on the exercise of rulemaking power to

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[9] Judge Edwards accuses the plurality of insufficient "judicial restraint," Edwards Op. at 14, but it is not clear by what standard one resolution of a question unanswered by *Harlow* is more or less "restrained" than another. Nor is it clear why one should view a book review by a member of the plurality, see *id.*, suggesting that courts take a modest role in monitoring the judgments of the political branches, as contradicting an opinion whose tendency (among the various plausible alternatives) is to do exactly that.

"abridge, enlarge or modify any substantive right." See *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. at 166-67 (leaving open question of whether courts are to apply "heightened pleading" requirement to claims against government officials). But we see no reason why the government officials' insulation from discovery would not be amply protected by the principle we have already described, entitling officials to summary judgment resolution of their qualified immunity claims before discovery. That being so, it is unclear how application of conventional pleading standards could amount to the sort of substantive abridgement forbidden by § 2072(b). Accordingly, we think it was not correct for the district court to apply, literally, a heightened pleading standard, quite apart from the invalidity of our now-abandoned direct evidence rule.

Quite obviously, however, the court and the litigants have been caught in a vortex of changing standards. And although the defendants have not moved for summary judgment since the filing of the Fourth Amended Complaint, it seems sure that they will do so. Moreover, plaintiff has been on notice at least since our 1991 decision of the need for "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Crawford-El*, 951 F.2d at 1317 (quotations and citations omitted). Accordingly, it seems overwhelmingly likely that the Fourth Amended Complaint represents at least a very close approximation of what Crawford-El can advance in resistance to the motion for summary judgment. In the unusual context of this case, then, we are hardly giving an advisory opinion when we consider whether affidavits embodying the assertions of the Fourth Amended Complaint could successfully withstand Britton's

motion for summary judgment, backed by the affidavit she has already filed.

1. *Whether Crawford-El Has Alleged a First Amendment Violation.* We first examine whether Crawford-El's allegations could possibly constitute a violation of a clearly established constitutional right. See *Siegert*, 500 U.S. at 227 (question whether the conduct complained of constitutes violation of clearly established law is at an "analytically earlier stage" than question of heightened pleading standard); see also *Kartseva v. Dep't of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (same); *Moore v. Valder*, 65 F.3d at 195 (same). Although the question is close, we hold that withholding Crawford-El's property in retaliation for exercise of his First Amendment speech rights would indeed be a violation of clearly established law.

We must answer two questions here: (1) whether Crawford-El's speech was protected under the First Amendment such that retaliation would be violation of a clearly established right and (2) how great the retaliatory injury must be. We start with the first. The Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78, 88 (1987), summarized existing precedent—including *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), and *Pell v. Procunier*, 417 U.S. 817, 822 (1974)—and set out the test controlling here: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Although on its face *Turner* applies only to regulations, several other courts have applied the test to other prison actions, including those in retaliation cases. *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990) (applying *Turner* in a First Amendment retaliation case); *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989) (same); cf. *Cornell v. Woods*, 69 F.3d 1383, 1388 (8th Cir. 1995) (in First

Amendment retaliation case, applying *Pell v. Procunier*, 417 U.S. at 822 ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.")). Several cases have held that a prisoner's right to have access to the press may be limited. *Pell v. Procunier*, 417 U.S. at 835 (upholding prison regulation prohibiting face-to-face media interviews with particular inmates designated by the press); *Kimberlin*, 6 F.3d at 791 n.6 (upholding under *Turner* warden's policy prohibiting prisoner press conferences and limiting prisoners' press access to settings expressly authorized under prison regulations). But no court has held that a total ban on communications to the press passes muster. Cf. *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971) (striking down ban on prisoner letters to news media insofar as the letters concerned prison matters; emphasizing that prison conditions are "an important matter of public policy" about which prisoners are "peculiarly knowledgeable"). And in light of *Turner* and related cases, retaliation against Crawford-El for criticism of the prison administration that was truthful, and not otherwise offensive to some penological interest (so far as appears), would have violated a clearly established right of which a reasonable prison official would have known. Cf. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 571-72 (1968) (holding that First Amendment precludes dismissal of a school teacher who criticized Board of Education's handling of a bond issue; public employees should be able to speak freely on issues of public concern without fear of retaliation).

As to the sort of injury cognizable under the First Amendment, Crawford-El here alleges the costs of replacing underwear, tennis shoes, soft shoes, and other items; shipping charges to get his papers back; and mental and emotional distress. In our earlier opinion in this case, we noted that some non-de minimis showing of injury is necessary in a

constitutional tort action, 951 F.2d at 1321, 1322, and cited *Ingraham v. Wright*, 430 U.S. 651, 674 (1978) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned."), and *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). *Bart* stated that "even in the field of constitutional torts *de minimis non curat lex*." *Id.* "It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise"—for example, a supervisor frowning at an employee in retaliation would not constitute sufficient injury. *Id.* Still, the effect on freedom of speech of retaliations "need not be great in order to be actionable." *Id.*; cf. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306-311 (1986) (out-of-pocket and mental distress damages recoverable for violation of Due Process Clause and First Amendment right to academic freedom); *Hobson v. Wilson*, 737 F.2d at 61-62 (mental distress damages recoverable for violation of First Amendment right of political association); *Frazier v. Dubois*, 922 F.2d at 561 (transfer of prisoner in retaliation for exercise of First Amendment rights is unconstitutional injury; citing cases).

The district court commendably latched onto our approval of *Bart* and applied a sensible standard—whether an official's acts "would chill or silence a "person of ordinary firmness' from future First Amendment activities." Mem. op. at 13 (quoting *Bart*). The court then found that the pecuniary losses Crawford-El sustained in the form of the costs of shipping his boxes and replacing clothing, though small, might well deter a person of ordinary firmness in Crawford-El's position from speaking again. We agree that the acts asserted pass that test.

2. *Whether a Jury Could Reasonably Find Clear and Convincing Evidence of Retaliatory Action.* The Fourth Amended Complaint alleges a variety of encounters between

Crawford-El and Britton from which plaintiff believes it can be inferred that the misdelivery of his goods must have been in retaliation for various activities that are protected by the First Amendment.

Crawford-El sets the stage with allegations that Britton was hostile to him because of his actions on behalf of fellow prisoners even before his contacts with the press. While he was Clerk for the Occoquan Facility Housing and Adjustment Board at Lorton (from about October 1985 to April 1986), he had frequent contact with Britton since she often served on that Board and Crawford-El often went to the nearby block containing Britton's office to photocopy. He claims that Britton, while despising all prisoners, was particularly hostile to him because he had been in charge of the law library when housed at the central facility at Lorton and had helped many prisoners prepare administrative grievances. According to Crawford-El, Britton deemed him "too big for his britches."

In April 1986 Crawford-El apparently invited reporters from the *Washington Post* to visit the prison, correctly noting on the visitor application form submitted to Britton that the proposed visitors' address was 1150 15th Street, NW, Washington, DC 20071, but discreetly omitting that this was the *Post*'s address. Britton approved the application. A reporter came, and on April 20, 1986 the *Post* published a front-page article under the headline "Jail Crisis Spills Into Occoquan Unit," subheaded "Crowding, Anger Grow as D.C. Inmates are Shifted to Va. Facility." It quoted Crawford-El's account of an alleged irregularity—that on his arrival at Occoquan a correctional officer had obtained trousers for him by searching in other prisoners' lockers for an extra pair. The next day, says Crawford-El, Britton called him into her office and told him he had "tricked" her and that "so long as [Crawford-El] was incarcerated she was going to do everything she had to to make it as hard for him as possible."

Between April 1986 and Crawford-El's next successful use of the press, he brought a variety of lawsuits against the District. In one, for property allegedly lost through prison officials' negligence, he recovered about $500; in three others he complained on behalf of himself and a class about the lack of food compatible with prisoners' Islamic beliefs, alleged interference with his religious beliefs, and sued, curiously, "for legal malpractice." In December 1988, while the suits were pending, he and a group of other prisoners were transferred to the Spokane County Jail. While assembled for the trip in shackles, the prisoners were videotaped. Plaintiff says that he and others protested the videotaping as a violation of their privacy rights, to which Britton responded, "You're a prisoner, you don't have any rights."

Shortly after arrival at Spokane, Crawford-El again spoke with a reporter from the *Post*. On December 18, 1988, another front-page article appeared, "Sudden Move Severs Inmates' Ties to D.C.; Isolation of Spokane County Jail Puts Prisoners "In a Firecracker Mood.' " It credited Crawford-El with the firecracker metaphor and also quoted him as claiming that the prisoners sent to Spokane were "the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds." Shortly after the publication of this article, according to Crawford-El, Britton told a Spokane County Jail official that Crawford-El was "a legal troublemaker," meaning, according to the complaint, "a prisoner who asserts her or his legal rights, or seeks administrative or judicial redress of grievances." As we noted before, "even prison officials free of hostility toward Crawford-El might regard "troublemaker' as an apt moniker." *Crawford-El*, 951 F.2d at 1319.

The alleged retaliatory act—the misdelivery of boxes—occurred in the course of Crawford-El's transfer back from Spokane to Lorton and thence on to a federal prison in

Marianna, Florida, a transfer over which Britton had charge. At Spokane, Crawford-El was instructed to give his property to officials there for forwarding to him. Crawford-El alleges Britton was aware of the boxes' importance to him, saying that when he and two other prisoners met Britton on August 18, 1989 at the Western Missouri Correctional Center en route back to Lorton, they told her that their boxes contained legal papers needed for ongoing cases. She allegedly said that she understood Crawford-El's need for the personal property and legal materials and that the boxes would be sent to her office.[10] (In her affidavit Britton contests the claim that she was ever told of the papers: "I do not recall plaintiff telling me that there were legal documents in his personal property, nor did I have knowledge of the contents of the three sealed boxes." She said she had the boxes sent to her office to keep them from being lost.)

In late August, after arriving back at Lorton, Crawford-El allegedly wrote to Britton requesting that his property be sent to him as soon as she received it. Shortly afterward, he noticed that some other prisoners returning from Washington State had got their property. Just before he was transferred, he checked with a Lorton "Property Officer" named Ward, who told him that he could have his property sent to him at his final destination by writing a request to that effect after arrival at that final destination. At still another intermediate stop, the federal prison in Petersburg, Virginia, Crawford-El learned from other D.C. prisoners that Britton had been calling their families asking them to pick up the prisoners' property because otherwise she would throw it away. He

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[10] On the trip back to Lorton, supervised by Britton, the property Crawford-El was carrying with him (and that of other prisoners as well) was put into storage on the bus and apparently lost. Crawford-El won an uncontested small claims court suit against Britton for $72.50 based on this loss.

called his parents, who told him his brother-in-law Jesse Carter had picked up his boxes. (Crawford-El was "upset" at this, since he believed he would have difficulty getting permission to receive the property once it had left the prison system.) According to Crawford-El's own allegation in the Fourth Amended Complaint, Carter told Crawford-El that Britton had told him that she was concerned about Crawford-El's legal materials and other property and was afraid the boxes would be lost if she sent them to the Lorton Property Officer for mailing to Crawford-El, and that federal prisons would not accept shipments of D.C. prisoner property. That account meshes with Britton's affidavit, which says that she asked Carter to take Crawford-El's property "only to insure its safety and protection from loss, and for no other reason whatsoever." (Britton also stated that "we had been advised by the Federal Bureau of Prisons that they would not accept the personal property of the prisoners.") But Crawford-El also says that Britton told Carter that Crawford-El "should be happy she did not throw [his property] in the trash."

In the course of Crawford-El's attempts to get his property back, his lawyer received a copy of a letter from the Corporation Counsel's office, stating:

> As has been our past practice, inmates transferring from DCDOC [the D.C. Department of Corrections] to BOP [the federal Bureau of Prisons] custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents.

The letter also said that there were "significant differences among DCDOC and BOP property policies and differences between individual BOP facilities" and noted that "[i]n special cases, we ask that DCDOC contact individual facility Inmate Systems staff for permission prior to mailing any inmate personal property to a BOP facility." Though Crawford-El's

mother forwarded the boxes on to him at the prison at Marianna, Florida, Crawford-El had some difficulty getting them, as he had expected. Crawford-El asserts that this was because they arrived outside prison channels.

The allegations supplying the strongest evidence of Britton's alleged malign intent are her threat to Crawford-El after the 1986 *Post* article to make things "as hard as possible for him" and her remark to Carter about throwing the boxes in the trash. But those comments—for both of which Crawford-El is the only source mentioned—are suspect as self-serving assertions. The complaint undermines the "trash" comment by affirmatively asserting that Carter said Britton told him she was giving him the property out of concern about its getting lost, an account that Britton's affidavit supports. As for the allegation that Britton told a Spokane County Jail official that Crawford-El was "a legal troublemaker," the complaint itself defines that term in such a way as to make it impossible to deny that the description is apt. The letter by Corporation Counsel on its face suggests some confusion about the federal Bureau of Prisons policy concerning transfer of D.C. inmate's personal property, reducing the likelihood that Britton's handing the property to his brother-in-law was a deliberate scheme to keep it away from Crawford-El. Indeed, in the absence of some reason to believe Britton thought Carter had it in for Crawford-El or was hopelessly incompetent (neither of which is claimed by Crawford-El), or thought that federal prison officials would much more readily allow Crawford-El to receive the property if sent by the D.C. Department of Corrections than if sent from outside the prison system, transfer of the boxes to the brother-in-law makes an awkward fit with any serious purpose to keep them from Crawford-El. In addition, Crawford-El's own complaint states that Britton had telephoned other D.C. prisoners' families to ask them to pick up those prisoners' property at Lorton—behavior further

reducing the chance that Britton's treatment of Crawford-El had any retaliatory purpose. In short, a jury could not reasonably find that Crawford's nonconclusory assertions constitute clear and convincing evidence of unconstitutional intent. On remand, Crawford-El may attempt to bolster his evidence—perhaps in part through discovery, if by amplifying his independent assertions he secures district court permission to conduct discovery pursuant to Judge Ginsburg's separate opinion, which is controlling on the issues as the opinion consistent with the disposition on the narrowest grounds, i.e., a "common denominator" of the reasoning of the majority, see *King v. Palmer*, 950 F.2d 771, 780-81 (D.C. Cir. 1991) (en banc)). If he adds no evidence, the district court should grant any future motion for summary judgment by Britton on the federal claims against her.

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Accordingly we vacate the dismissal of Crawford-El's First Amendment retaliation claim against Britton, and the pendent conversion claim (see *supra* note 1), and, once the panel has resolved the issues between Crawford-El and the District (see *id.*), remand the case to the district court for further proceedings.

So ordered.

SILBERMAN, *Circuit Judge, concurring*: Crawford-El, a D.C. prisoner serving a life sentence for murder and a chronic litigant whom we have previously described as a "trouble maker," *Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 818 (1992), has brought a damage claim (now amended four times) against a prison official who allegedly retaliated against him for the exercise of his constitutional rights to bring innumerable law suits (and talk to the press) by allowing his boxes of "legal material" to be picked up by his *brother-in-law* (horrors!) when the plaintiff was transferred from one prison to another.

There was a time, not too many years ago, when any American lawyer or judge hearing that such a case was the subject of an *en banc* hearing in a federal court of appeals, even that it plausibly could be brought as a claim in a federal district court, would have been incredulous. Before I discuss what I believe to be the appropriate resolution of the case—given the state of present law on qualified immunity of government officials—I think it worthwhile to trace the jurisprudential steps that have led us to this situation. Particularly is this so because some justices have expressed legitimate concerns about the degree of judicial "policymaking" implicated in fashioning the substantive and procedural framework of qualified immunity, *see Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J., concurring, joined by Justice Scalia);[1] *see also* Chief Judge Edwards' Sep.

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[1] Qualified immunity is not a new innovation and some have expressed concern insofar as it has been extended beyond its common-law boundaries. But at common law, we did not have constitutional torts as such. Moreover, pre-trial discovery in the nineteenth century was not burdensome (in sharp contrast to our current system) due to the severe restrictions placed on it, if it was allowed at all, even in the most permissive of states. *See* Wolfson, *Addressing the*

Op. at 14-15, overlooking the much more fundamental—and troublesome—judicial policymaking involved in creating the causes of action that have given us the problem.

I.

Federal damage actions that typically raise qualified immunity concerns are those brought against federal officials as *Bivens* actions or against state officers under § 1 of the 1871 Civil Rights Act (hereinafter § 1983). Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). Ironically, § 1983 was the least controversial provision in the 1871 Act, attracting little attention or debate. And for almost 100 years the federal courts read that statute as it was clearly intended, to attack the so-called "Black Codes" passed by Southern states after the civil war, not private torts. *See, e.g., Lane v. Wilson*, 307 U.S. 268 (1939); *Brawner v. Irvin*, 169 F. 964, 968 (C.C.N.D. Ga. 1909) (dismissing case that alleged that the police chief had whipped petitioner for striking his relative since it alleged only a private tort). But in 1961 in *Monroe v. Pape*, 365 U.S. 167, the Supreme Court extended the statute to reach the behavior of Chicago police officers who did not

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Adversarial Dilemma of Civil Discovery, 36 CLEV. ST. L. REV. 17, 25-27 (1987).

claim their actions were sanctioned under state law. Indeed, there was little doubt that the plaintiffs had a tort remedy under Illinois law. But as is so often true when the Supreme Court hands down a decision that substantially expands federal judicial power, the facts were dramatic: thirteen Chicago police officers broke into the Monroes' apartment, forced the Monroes to stand naked at gunpoint in the middle of their living room, struck their children, and called Mr. Monroe "nigger" and "black boy." *Id.* at 203 (Frankfurter, J., dissenting in part). The Court overrode what seems to me to be the characteristically impeccable reasoning of Justice Frankfurter (when he was relying on reasoning rather than rhetoric) in dissent, and turned § 1983 into a provision that the post-civil war Congress could not possibly have visualized. *See* Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985). The Court's construction effectively read out of the statute the "under color of law" limitation, making it synonymous with the Fourteenth Amendment's state action requirement.[2] Subsequently, the Court discovered a whole series of new constitutional rights and applied the Bill of

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[2] The Court's interpretation of "under color of law" has not been its only creative interpretation of § 1983. It has allowed litigants to use § 1983 to enforce statutes that have no connection to the Fourteenth Amendment or the post-civil war civil rights legislation. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). The Court was not discomforted that its interpretation would result in the scope of § 1983 being vastly greater than its jurisdictional counterpart (which was the only conceivable basis for § 1983 suits until § 1331 was passed some years later). The dissent in *Thiboutot* indicated that it is "idiotic" to interpret § 1983 in this fashion. *Id.* at 21 n.9.

Rights to the states.[3] As a result, the 296 federal civil rights actions against government officials filed in 1961 have exploded into over 40,000 by 1988, over half of which were filed by prisoners. In just the period between 1975 and 1984, the number of prisoner civil rights cases increased by approximately 200%, from 6,606 to a staggering 18,856. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 667 (1987). In contrast, there were only 21 cases decided under § 1983 in its first 50 years. *See Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

Then, in 1971 the Court, in perhaps an even more stunning exercise of judicial policymaking, fashioned a federal cause of action for damages against *federal* officials for a "constitutional tort." In *Bivens v. Six Unkown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the facts were again grim; six federal law enforcement officials without a warrant broke into the apartment of the plaintiff to conduct a search. He was arrested in front of his wife and children—who were also threatened with arrest—for a narcotics violation and was subsequently interrogated, searched, and booked. The case against him was ultimately dismissed. *Bivens* reflected the Court's *policy* proclivity to "equalize" the obligations of constitutional law imposed on state government to those imposed on federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Butz v. Economou*, 438 U.S. 478, 501-03 (1978).

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[3] In fairness, "incorporation" of the Bill of Rights had begun a long time before. *See, e.g., Smyth v. Ames*, 169 U.S. 466, 525-26 (1898) (applying the "Takings Clause" to state rate regulation of railroads).

To be sure, prior to 1875 and the passage of the general federal question jurisdiction statute, an injured party could bring a common-law suit in state court against a governmental actor. The governmental official would then raise as a defense that he was acting pursuant to a statute or authority vested in him—a defense which could be defeated by showing that the statute or delegated authority was unconstitutional. For instance, the Fourth Amendment's prohibition against unreasonable searches and seizures was enforced by bringing a common-law trespass action against a governmental official, an action which an official could not defeat by invoking a claim of authority violative of the Fourth Amendment.[4] *See Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Of course, there was no *a priori* assurance that there would always be a common-law right guaranteeing a remedy for an official's unconstitutional action (although there normally would be), but this is only a problem if one thinks that there is an *a priori* reason to believe that every constitutional violation must be remedied. Our historical practice simply does not support the proposition that the Constitution is self-executing. *Cf. Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J. dissenting) (explaining that it is "untenable that there must be a judicial remedy for every constitutional violation").[5]

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[4] In actions for trespass, the defendant would typically seek damages against the trespasser. *See, e.g., Huckle v. Money*, 95 Eng.Rep. 768 (1763). While one might be tempted to argue that since the framers envisioned the Fourth Amendment being enforced through actions for damages—where the Fourth Amendment negated the government official's defense—the important point is that the underlying cause of action was a creature of state law.

[5] One should keep in mind that even under the most narrow construction of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it

After 1875, the Court started down a different path. It gradually concluded that an implied cause of action under the Constitution existed where the remedy sought was an injunction. The Court by "almost imperceptible steps ... appears to have come to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954). This process culminated in *Ex Parte Young*, 209 U.S. 123 (1908), in which the Court upheld an injunction of a state official where the alleged wrong was the threat of future prosecutions. Whatever the validity of this reasoning in an era when the courts had license to create general federal common law, *see Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), there is no question that the Court's finding of an implied right to an injunction against a government official in his *official* capacity is on far more solid ground than the creation of an implied right to *damages* against a governmental official *as an individual*. After all, the Constitution (with a few exceptions such as the Thirteenth Amendment) is concerned with limitations on the power of government. Individuals are implicated only insofar as they act as agents of the government as opposed to private tortfeasors. Moreover, the Court has for the last hundred years consistently followed this line of reasoning in finding an implied right to an injunction; *Bivens* suits lack such a pedigree.[6] *See, e.g., Davis v.*

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is inevitable that some meritorious suits will be barred. This should not be surprising since the very notion of an "immunity" from suit, as opposed to a "defense," entails that valid constitutional claims will be barred.

[6] The Court has implied a damages remedy in order to enforce the Fifth Amendment's prohibition on the taking of private property for public use without just compensation. *See*

Passman, 442 U.S. 228, 241-43 (1979) (explaining this tradition); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996); Collins, "*Economic Rights*," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510 (1989). The availability of the historically recognized right to injunctive relief obviates the need for a judicially-created damages remedy. As Justices Frankfurter and Brandeis explained (and as implicitly recognized by Justice Harlan in his *Bivens* concurrence) "remedies" are independent of "rights." Remedies can vary based on the weighing of numerous policy considerations

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Jacobs v. United States, 290 U.S. 13 (1933). However, the damages remedy was against the *government* and has explicit textual support in the Amendment's requirement that "just compensation" be paid. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (citing cases that "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking").

Some have argued that the Court after 1875, even if rarely, also implied a personal damages remedy. In most of these cases, the Court seems to have conceived of the cause of action, although admittedly sometimes artificially, as based upon the common law. In *Wiley v. Sinkler*, 179 U.S. 58 (1900), and *Swafford v. Templeton*, 185 U.S. 487 (1902), the two most cited examples of this implied damages remedy, the Court concluded that the lower federal court had federal question jurisdiction to entertain a suit for damages against state officials for their interference with the plaintiffs' right to vote in federal elections since it involved the construction and application of the Constitution. The Court in these cases was focused on whether the suits raised federal questions, not the legitimacy of the damages remedy, although the two questions admittedly do overlap.

even while the right being enforced remains the same. *See Truax v. Corrigan*, 257 U.S. 312, 354-57 (1921) (Brandeis, J., dissenting); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 205-223 (1930). The lack of a damages remedy does not denigrate or change the nature of the underlying right.

The point to bear in mind then, before turning to the qualified immunity question, is that the causes of action that largely create the problem that qualified immunity addresses were not created by Congress; they were devised by the Supreme Court without any legislative or constitutional (in the sense of positive law) guidance. Justice Harlan candidly admitted in his concurring opinion in *Bivens*, and as subsequently affirmed by the whole Court, *see Bush v. Lucas*, 462 U.S. 367, 376-78 (1983), that the Court, in crafting a remedy, feels free to take into account the range of policy considerations "at least as broad as the range of those a legislature would consider." 403 U.S. at 407. As Justice Rehnquist pointed out in dissent in *Carlson v. Green*, 446 U.S. 14, 36 (1980), this quasi-Article I legislative function of open-ended balancing of different policy considerations and goals is ill-suited for the judiciary.[7] The best solution to the whole problem would be the flat overruling of both *Bivens*—as Justice Rehnquist called for in *Carlson*—and *Pape*, putting the issue of damage remedies against state or federal officials for constitutional torts where it belongs—with states and Congress. But since the Supreme Court, in accordance with public choice theory, *see generally*

[7] To the extent that the *Bivens* Court relied on the Court's authority to infer private damages remedies in the face of statutory silence, *see Bivens*, 403 U.S. 388, 398 (Harlan, J., concurring), this has been undermined by subsequent case law. *See Carlson*, 446 U.S. at 39 n.5.

J. BUCHANAN & G. TULLOCH, THE CALCULUS OF CONSENT (1962) (arguing that all rational actors, including those in government, pursue power), follows its own version of the Breznev Doctrine—no significant retreat from extensions of federal constitutional power (unless perhaps, if confronted by Congress)—that is a vain hope.[8]

II.

As I have indicated, shocking factual allegations played no small part in the development of the law in *Pape* and *Bivens*. (Many journalists and lawyers describe as a virtue a hypothetical Supreme Court justice's disposition to decide in accordance with the facts of a particular case; they mean the justice should decide how the dispute should be resolved using a Solomonic policy-oriented methodology and then the law should be fashioned to accommodate that resolution.) It is hard to imagine a similar outcome in either case if facts akin to Crawford-El's had been presented. In other words, if *Pape* or *Bivens* had involved constitutional tort claims that depended on allegations that the actor's *motive* was proscribed, I am confident that the Supreme Court would not have gone down either path, especially in light of the probative difficulties that motive-based wrongs necessarily involve, because virtually any ostensibly legal action taken by a government official can be thought unconstitutional if prompted by an unconstitutional motive.

Viewed in this light, Judge (now Justice) Ginsburg's "heightened pleading" requirement that a plaintiff allege *direct* evidence to show an unconstitutional motive for actions that would otherwise be perfectly legal might be thought an effort to keep a *Bivens* claim close to the kinds of facts that moved

[8] It could be argued that the Supreme Court's withdrawal from *Lochner* is an exception, but of course substantive due process grew back anew in "politically correct" gardens.

the Supreme Court to create the cause of action in the first place. *See Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987). Theoretically, circumstantial evidence is not inherently weaker than direct evidence, but I think Judge Williams' opinion overstates the matter—by a good deal—when it argues that "we have no reason to think that it did any better as a screen, than, say a random rejection of nine out of every ten claims." Judge Williams' Op. at 10. Since direct evidence of an unconstitutional motive for an ostensible legal act is virtually never available (I do not recall ever seeing such a case since *Martin* was decided), the *Martin* heightened pleading requirement effectively kept *Bivens* unconstitutional motive cases from going to discovery and trial in our circuit for 10 years. That result, no matter how reached, is not only desirable, it is implicitly contemplated, as I explain below, by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, whatever the logical flaws in the direct versus circumstantial evidence distinction or the designation of a "heightened pleading" requirement, I would have been content to hold to *Martin* as precedent—which under Judge Edwards' reasoning would be the most judicially restrained choice—but as long as the court is determined to reexamine the doctrine, I prefer a somewhat different approach than does Judge Williams.

In actual practice, Judge Williams' clear and convincing test applied at the summary judgment stage may well have the same ultimate impact as the *Martin* test. Under both standards, it would appear quite difficult for a plaintiff to gain discovery, let alone a trial, if the government official's bad motivation is the key to making out the constitutional tort. Still, the test as set forth by Judge Williams holds out the prospect of confusion in application. I am not sure I understand just what sort of showing a plaintiff must make to meet the "specific, non-conclusory *assertions* of evidence, in affidavits or other materials suitable for summary judgment"

test. Judge Williams' Op. at 13 (emphasis added). Or how that differs from Justice Kennedy's requirement that "the plaintiff must put forward specific, nonconclusory factual *allegations* which *establish* malice." *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (emphases added). Or how either standard differs from the Seventh Circuit's cryptic phrase "[u]nless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery." *Elliott v. Thomas*, 937 F.2d 338, 345 (1991). For example, would Judge Williams' disposition differ if the plaintiff produced an affidavit asserting that in a private conversation with him the defendant unequivocally stated that she intended to punish him, for his vexing litigation, by giving his "legal papers" to his brother-in-law? Would Justice Kennedy's or Judge Easterbrook's? I fear Judge Williams' approach, while certainly preferable to Judge Edwards',[9] will promise a good deal of further litigation with very little return in providing relief in supposedly meritorious cases.

Judge Ginsburg's approach promises even more confusion—and ungoverned variance among the practice of district judges. By permitting discovery upon a showing based on "specific evidence within the plaintiff's command, that such discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor," Judge Ginsburg asks each judge to use his or her crystal ball rather than a rule of decision. The *ex ante* impact on potential defendants' behavior would not under this formulation differ meaningfully from Judge Edwards' position. In my view it will induce more paralysis than discouragement of wicked actions. It is

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[9] I quite agree with Judge Williams' discussion of *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and also agree that a plaintiff is entitled to discovery for certain other purposes. Judge Williams' Op. at 13-14.

perhaps one of the simplest axioms of law and economics that overdeterrence as well as underdeterrence yields inefficient results. *See* P. SCHUCK, SUING GOVERNMENT 68-75 (1983).

I think the more straightforward solution, following *Harlow*'s reasoning, is to hold that when the defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed. If the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity. *Cf. Halperin v. Kissinger*, 807 F.2d 180, 188 (D.C. Cir. 1986). Although *Harlow* dealt specifically with a different subjective aspect of an official's motivation—his knowledge or appreciation of governing constitutional law—as Judge Williams notes, the Court in *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), read *Harlow* as having "purged qualified immunity doctrine of its subjective components." *See also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (explaining that the *Harlow* Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action"). More important, *Harlow* itself unequivocally states that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. That thought certainly strongly suggests that a factual dispute over whether the defendant's otherwise legal action is rendered illegal because of an unconstitutional motive cannot defeat a qualified immunity defense. The *Harlow* Court manifested a clear awareness of the peculiar difficulties that litigation over *any kind* of motivational disputes entail:

> There are special costs to "subjective" inquiries.... In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding

> discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment ...

Id. at 816. The Court specifically noted that "petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith' standard established by our decisions." *Id.* at 814-15. The gravamen of the petitioners' argument was that the qualified immunity available under *Butz* was undermined by district courts which "routinely denied motions for summary judgment on the ground that the claim of malice or bad faith automatically raised a triable issue of fact as to the defendant's state of mind." It would be odd if the Court found this concern persuasive and yet reformulated the qualified immunity inquiry in a way that was not responsive to the difficulty of defeating at summary judgment intent-based constitutional suits. Nor is it at all clear that allowing a government official, as Judge Williams puts it, Judge Williams' Op. at 16, to maliciously perpetrate a constitutional violation (so long as the constitutional right was not so clearly established that a "merely reasonable person" would not have known it) is less "egregious," Judge Williams' Op. at 11, than allowing the same official to take an objectively reasonable action that would be blameless if the defendant's motives were benign. The very logic that leads my colleagues to reject the distinction between direct and circumstantial evidence, it seems to me, could lead to a similar rejection of the distinction between two subjective elements (knowledge of the law and actual motivation) of the constitutional tort/qualified immunity analysis.

Yet, as Judge Williams correctly notes, the circuit courts have shrunk from that interpretation of *Harlow*. They have done so, it appears, because of a concern that has driven much of American jurisprudence in the latter half of the twentieth century; the prospect of a racially discriminatory act. *See, e.g.*, Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV.1255 (1994) (discussing the impact of race on the evolution of criminal law). Thus in *Elliott*, the Seventh Circuit recognized that:

> [c]arrying out the program of *Harlow* seems to imply attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution. Yet that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong—as it is in cases of *racial discrimination*, excessive punishment, and many other constitutional torts.

937 F.2d at 344 (emphasis added). Similarly, in *Halperin*, where we actually so applied *Harlow*, at least to "national security cases," *see* 807 F.2d at 187-88, we revealingly suggested that to conclude that *Harlow* meant to preclude inquiry into *all* intent would permit a defendant "to discriminate on the basis of race." *Id.* at 186.

Giving *Harlow* its logical extension does not, in my view, present any special problems of encouraging racial discrimination, because, as I will discuss shortly, there are other restraints on discriminatory official action. Therefore, I would extend to all unconstitutional motive actions the principle adopted in *Halperin*, where we held that if the government defendants' actions (wiretaps) in a *Bivens* case would be "validated" by a legitimate national security motive,

the defendants are entitled to immunity if they purport to act for national security reasons, unless a jury could conclude that it was *objectively* unreasonable for the defendants to so act. A simple hypothetical illustrates its ease of application. Suppose a plaintiff claims that a defendant (perhaps a judicial official not covered by Civil Service or Title VII legislation), *see Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), impermissibly fired her because of her race. The defendant claims that the plaintiff was discharged because of budget constraints. If the defendant's rationale would have been objectively reasonable under the circumstances, the defendant wins on summary judgment. In contrast, if a reasonable trier of fact could find that budget constraints were objectively unreasonable under the circumstances (if, for instance, the official's division recently received a windfall of funds or hired a number of additional workers), the case would proceed to trial.[10] *Cf. Halperin*, 807 F.3d at 189 (noting that the defendants win on summary judgment if they "adduce sufficient facts that no reasonable jury ... could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons").To be sure, as I have noted, in *Halperin* we limited our holding to national security cases, perceiving a particular need to protect the executive branch from probing into motivations that touch such sensitive issues. There the government's wiretap was thought to be unconstitutional unless it was motivated by national security concerns—so it appeared as if it was the government that put motivation at issue. But, I think that formulation is deceptive. Any action, the discharge of a government employee say, could be phrased the same way; as either illegal if motivated by unconstitutional discrimination or constitutional if not.

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[10] Of course, if the government official (or the government) does not deny that the defendant acted with an unconstitutional motive, that is another matter.

Perhaps all the *Halperin* panel meant by the notion of a "validating" intent is that, as a matter of substantive law, the burden was on the government to prove its motivation was driven by national security concerns. But suppose a government agency discharged an employee for alleged national security reasons and the employee claimed it was for racially discriminatory grounds. Judge Williams does not explain whether under such circumstances *Halperin* or his clear and convincing test governs. (Indeed neither Judge Williams, Judge Ginsburg, nor Judge Edwards discusses the relevance of *Halperin* to their respective tests—making it a silent orphan—so it is wholly indeterminate whether it is affected by this *en banc* proceeding.) *Halperin*'s reasoning avoids this analytical difficulty: if the challenged defendants' actions, without regard to their actual intent, are consistent with an objectively reasonably intent, the defendants are entitled to immunity. And even if the defendants are not able to meet this burden, they are still entitled to immunity if they are able to prove that their actual motivation was legitimate.[11]

Judge Ginsburg (and to a lesser extent Judge Williams), although assiduously avoiding a reference to *Halperin*, criticizes my approach as creating inevitable incentives to unconstitutional behavior. But, of course, the same criticism can be made against either of their positions insofar as they strengthen a defendant's hand even fractionally over Judge Edwards' position. There is simply no escape from a

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[11] *Harlow* allows the use of evidence concerning subjective motivation if it *benefits* the government. "[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. The Court then notes, somewhat cryptically, that "[b]ut again, the defense would turn primarily on objective factors."

judgment, without any empirical data, as to where along the spectrum to draw the line between the interests of discouraging unconstitutional behavior and avoiding the peculiar difficulties that the threat of personal damage suits against public officials entail.

In any event, I do not think the matter is quite as simple or self-evident as Judge Ginsburg's downward sloping demand curve. We should bear in mind that in these cases, which often arise in an employment context, the defendant, even if he or she acts in part with a proscribed motive, that motive typically is only a contributing factor to a decision. This has led to terribly complicated jurisprudential efforts to develop techniques to measure the relative importance of the proscribed motive. *Cf. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as modified by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified and amended in scattered sections of 42 U.S.C. (Supp. V 1993). Take the present case. How would we really distinguish between the defendant's hard feelings (if they could be established) toward the plaintiff because he is a self-evident pest as opposed to the more grandly phrased "because of his exercise of his First Amendment rights"?

The truth of the matter—as most practitioners in the labor and EEO field well know—is that a determination as to the existence and relative importance of an illegal motive is difficult, often artificially relying on certain presumptions. And the behavior of the potential defendant *ex ante* is typically directed at avoiding those indicia of the proscribed motive that will tend to be relied upon in that substantive area of the law. (Can one imagine an employer deciding whether to discharge a employee for theft attempting, perhaps through

yoga, to cleanse his mind of any hostility because of the employee's union status?)

Still, it is difficult to deny that, at least theoretically, Judge Williams' view and even more Judge Ginsburg's position creates a greater disincentive to government officials taking action with an unconstitutional motive than does mine. But, personal damage suits are decidedly not the only disincentive. We should bear in mind of what my colleagues fail to take sufficient account—that there are restraints against such behavior other than § 1983 or *Bivens* damage suits. When officials violate citizens' rights, they expose themselves to disciplinary sanctions, harm to their professional reputations, and reduced opportunities for advancement. *See, e.g.*, SCHUCK, *supra*, at 69. Unlike normal tort law, federal and state officials are sworn to uphold the Constitution; violating one's oath may mean a reputation for deceit and unreliability. Certainly a rational actor would avoid this result, if only to avoid a decrease in his or her value as an employee. *Cf.* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967 (1984); R. POSNER, OVERCOMING LAW 109-44 (1995). To the extent an individual fears moral retribution, the oath will further induce proper behavior. I hope I will be forgiven for assuming that such an oath, like a monetary disincentive, can affect the behavior of government officials. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Webster*, 486 U.S. at 613 (Scalia, J., dissenting). Individuals who fear divine punishment also face a downward-sloping demand curve: as the level of sin rises, the punishment increases.

Moreover, a number of federal statutes are aimed at governmental unconstitutional conduct. Even in the absence

of suits for money damages,[12] government officials will be deterred by the threat of criminal prosecution.[13] Government officials possess no general immunity from such actions. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (noting that the Court has "never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law. Even judges, who have long been cloaked with absolute immunity from damages, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983").

Federal statutes providing causes of action against the government itself—particularly those targeted at

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[12] In addition to § 1983, plaintiffs can sue officials for monetary relief under 42 U.S.C. § 1981 (1994) (civil action for denying persons the "full and equal benefit of all laws and proceedings" guaranteeing security of persons and property); § 1982 (civil action for interference with citizens' property rights on the basis of race); § 1985 (civil action for conspiracy to deprive persons of equal protection of the laws); and § 1986 (civil action for failure to prevent a conspiracy to interfere with § 1985 rights).

Admittedly, as Judge Ginsburg notes, qualified immunity may apply to these actions for money damages as well.

[13] *See, e.g.*, 18 U.S.C. § 241 (1994) (criminal action for conspiracy to "injure, oppress, threaten, or intimidate" a person in the exercise of his constitutional rights); § 242 (criminal action for deprivation of a person's constitutional rights on account of a person being an alien or by reason of his race).

discrimination—provide additional deterrence.[14] The government undoubtedly looks askance to official misconduct that subjects it to liability. *See, e.g.*, Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 PITT. L. REV. 935, 1003 (1989) ("Deterrence ... is most effective at the level where control lies. It is the government and not the individual employee, which has the ability to change policy, discipline misconduct, and require a different kind of training."). And with respect to the actions of state or D.C. officials, there are, as Justice Frankfurter noted, state causes of action for damages.

Insofar as this panoply of remedies contains lacunae, I would leave it to Congress to fill them.[15] The gaps tolerated

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[14] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) (providing for a cause of action for some federal governmental activity that constitutes a tort under state law); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1988 & Supp. V 1993); Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified as amended in scattered sections of 5 U.S.C. (1994)) (establishing the Office of Special Counsel to investigate and prosecute allegations of supervisory abuse within the civil service disciplinary structure). Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634 (1994) (civil action for employment discrimination based on age); Rehabilitation Act, 29 U.S.C. § 794 (1988) (civil action for discrimination on the basis of disability).

[15] *See, e.g., Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend Bivens' action to civil service employees, even while assuming that existing remedies do not provide complete relief for plaintiffs, "because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it"); *Schweiker v.*

by the Supreme Court and this circuit undermine Judge Ginsburg's argument that without resort to § 1983 and Bivens' suits, individuals like Crawford-El may not have redress. In *Schweiker*, for example, the Court acknowledged that "[t]he trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker*, 487 U.S. at 428-29. Nonetheless, the Court deferred to Congress' decision whether to leave a gap. Similarly, in *Spagnola*, this Circuit denied the appellants' argument that, because "no remedy whatsoever"existed for individuals aggrieved by minor personnel actions under the Civil Service Reform Act, the court was obliged to create a Bivens' remedy. This deference makes sense as a constitutional and practical matter; given their greater resources and access to information, legislators are more likely than district court judges to reach the most socially beneficial result.[16]

Chilicky, 487 U.S. 412, 429 (1988) (refusing to create a Bivens' remedy in light of an elaborate scheme devised by Congress and noting "[w]hether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex ... program"); *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (holding that "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has "not inadvertently" *omitted damages remedies for certain claimants* and has not plainly expressed an intention that the courts preserve Bivens' remedies" (citation omitted) (emphasis added)).

[16] *See, e.g., Bush*, 462 U.S. at 389 ("Not only has Congress developed considerable familiarity with balancing

In any event, that there are real gaps is doubtful: by 1985 only 30 *Bivens* suits out of more than 12,000 resulted in a monetary judgment for the plaintiff at the trial level with only *four* judgments actually having been paid. *See* Written Statement of John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985) at 1. Obviously, the vast majority of these suits are meritless. *See* Fallon, Meltzer & Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1122 (4th ed. 1996) ("The view that constitutional tort actions are less likely to prove meritorious than civil litigation has been confirmed as to both prisoner and nonprisoner actions ..., although it is in the former class that the general lack of substance is most striking."). Prisoner suits serve less as a necessary deterrent to unconstitutional conduct (to put it mildly) than as a diversion from the monotony of prison life to plaintiffs such as Crawford-El, whose injury is the inconvenience of having some boxes being turned over to his brother-in-law. Perhaps all sides in this dispute would have been better off if the prison officials had agreed to provide an alternative form of entertainment to Crawford-El, maybe free

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governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."); *United States v. Gilman*, 347 U.S. 507, 511-513 (1954) ("The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.").

cable, in return for not having to go through the expense and hassle of this lawsuit.[17]

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Although my reading of *Harlow* will reduce the costs to government officials—and the public—caused by *Bivens* actions and the impact of *Pape* on § 1983, much the better would be for Congress to legislate on the whole subject as it has on certain aspects of prisoner suits. The Supreme Court has recognized that when and if it does, the federal judiciary should beat a hasty retreat. *See Bush*, 462 U.S. at 368, 390.

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[17] Congress has already taken steps to limit prisoner suits. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801 *et al.*, 110 Stat. 1321 (1996).

GINSBURG, *Circuit Judge*, concurring: I agree with the clear majority of my colleagues who conclude that the direct-evidence rule of *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431 (D.C. Cir. 1987), should be abandoned. I also concur in Judge Williams' opinion insofar as it requires that a § 1983 or *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the defendant's unconstitutional motive (where that is an element of the tort) by clear and convincing evidence. As Judge Williams details, a plaintiff will feel the weight of this burden not only at trial but also in opposing a motion for summary judgment; in both contexts the plaintiff will have to present evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive.

I cannot concur, however, in Judge Williams' attempt to place an even greater burden upon the plaintiff at the summary judgment stage. He would require the district court to grant summary judgment prior to discovery unless the plaintiff already has in hand evidence of the defendant's motive that a reasonable jury could find "clear and convincing." That seems a rather bold intrusion into the district court's management of the fact-finding process, an area in which we generally defer to the trial judge. The consequences would be twofold. First, Judge Williams' proposal would put compensation beyond the reach of even the plaintiffs with the most meritorious claims—a consequence arguably consistent with *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), in which the Supreme Court accepted that some deserving plaintiffs would be denied compensation in order to reduce the social costs of litigation against government officials. Second, Judge Williams' approach would invite an increase in the number of constitutional torts that are committed—a consequence more difficult to square with *Harlow*.

I. General Principles

In relating this case to *Harlow*, we must consider not only the compensatory role of constitutional tort liability but also its deterrent purpose. The rule announced in *Harlow* probably did not increase the frequency with which public officials knowingly violate someone's constitutional rights. An official who knows that the action he is contemplating would violate an individual's constitutional rights can hardly be confident that a court will later disagree—more precisely, that the court will conclude that the official's action was objectively reasonable under the law as clearly established at the time. *Harlow* is cold comfort, *ex ante*, to that official. This is why the Court could say in *Harlow* that the rule announced there would "provide no license to lawless conduct." 457 U.S. at 819.

We cannot make the same statement about the requirement that the plaintiff prove his case by clear and convincing evidence; as sure as we are that demand curves slope downward and that there will be more of a behavior when the price (or penalty) goes down, we can be confident that raising the plaintiff's burden of persuasion will embolden some additional Government officials to take actions that they know are unconstitutional. Although we cannot know the magnitude of that effect (*i.e.* the slope of the demand curve for tortious conduct), I agree with Judge Williams that we are justified in taking this step to contain the social cost of litigating constitutional torts that turn upon the defendant's motive.

My colleague, however, would take not only this but a second step beyond *Harlow;* he would not only raise the plaintiff's burden of persuasion but also require the plaintiff to obtain evidence without the ability to compel its production from those most likely to have it. No matter whether the

plaintiff can demonstrate that he has a reasonable chance—or for that matter a virtual certainty—of obtaining such evidence from the defendant or even a third party, such as one of the defendant's coworkers, Judge Williams would deny him any discovery. This would further reduce the deterrent effect of constitutional tort liability, perhaps to a point below what is justified.

Judge Williams overlooks the point; Judge Silberman faces up to it but reminds us that "personal damage suits are decidedly not the only disincentive" to unconstitutional conduct. The federal statutes that he cites, however, do not justify the balance that he or Judge Williams would strike between the interests of injured plaintiffs and the public interest in avoiding unfounded litigation against government officials. First, those statutes do not reach all the motive-based constitutional torts for which a plaintiff can seek redress under *Bivens* or § 1983. Second, a plaintiff who seeks damages against a public official under any of the cited statutes has no greater access to discovery than does a plaintiff who sues for the same remedy under *Bivens* or § 1983; qualified immunity shields the public official from personal damage liability regardless of the particular type of action brought against him. *See Todd v. Hawk*, 72 F.3d 443, 445 n.7 (5th Cir. 1995) ("Racial discrimination claims brought under § 1981 are subject to the defense of qualified immunity"); *Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1994) ("section 1985(3) encompasses actions against federal officers, subject, of course, to considerations of qualified immunity").

Effective deterrence of unconstitutional conduct depends unavoidably upon exposing public officials to some risks that might also chill them in the proper exercise of their discretion. In order to obtain any other remedy or impose any sanction, the plaintiff or prosecutor respectively will have to show that

some public official acted with a prohibited motive—racial, religious, or gender discrimination, retaliation for protected speech, or what have you. Although the public official will be shielded from personal liability and, perhaps, from the cost of retaining counsel, he will not be shielded from the demands upon his time, the risk of injury to his reputation, the emotional distress likely to attend an adversarial inquiry into whether his actions were basely motivated, or the possibility of unpleasant consequences apart from the litigation (such as losing his job) if the inquiry shows that his actions were improperly motivated. Therefore, that a particular rule, such as the one Judge Silberman proposes, would leave in place some deterrent effect because some types of cases might still be brought tells us little about whether the rule strikes an appropriate balance between our interest in deterring constitutional torts generally and our interest in reducing the social costs of litigation against public officials. Judge Silberman suggests, based upon the low success-rate of *Bivens* and § 1983 actions, that there is not much out there to deter. He does not consider, however, that the low-success rate is, in part, a result of the qualified immunity doctrine and other legal rules. We cannot know how much additional unconstitutional mischief the rules proposed by Judges Silberman and Williams would elicit, but that seems reason enough to proceed with more caution than either of them displays. A more prudent and discriminating approach—one that may preserve the desired deterrent while still lessening the burden now placed upon defendant public officials—would be to provide more guidance than we have heretofore given to district judges faced with the task of balancing, case by case, the competing values accommodated by the institution of qualified immunity. We could then rely upon them, as we normally do, to manage the fact-finding process that my colleagues would truncate with clear but Draconian rules.

When a defendant files a motion for summary judgment and the plaintiff argues that he needs discovery in order to withstand the motion, Rule 56(f) invests the district court with discretion to (1) deny the motion for summary judgment, (2) continue the motion pending discovery, or (3) "make such other order as is just." In a case involving qualified immunity, the district court abuses this discretion if it fails duly to consider not only the competing interests of the parties—as in any civil litigation—but also the social costs associated with discovery had against a government official.

Hence, while this court has acknowledged that "in the mine-run of cases" summary judgment is generally inappropriate until all discovery has been completed, *Martin*, 812 F.2d at 1436, we have also recognized that "creditable pleas of official immunity remove cases from the mine-run category," *id.* at 1436-37. Although we now reject then-Judge Ruth Bader Ginsburg's elevation of direct over circumstantial evidence, *see id.* at 1435, we ought not forget her description of our task in a case such as this—to "leav[e] some space for discovery" while "minimiz[ing] the burdens imposed upon government officials." *Id.* at 1437.

In *Martin* we required the plaintiff to make factual allegations sufficiently precise to enable the district court to "employ with particular care and sensibility [its] large authority to exercise control over discovery." *Id.* at 1437. We expected that district courts would protect government officials from "unnecessary involvement in [ ] litigation" by "permit[ting] particularized interrogation of the defendants for the circumscribed purpose of ascertaining whether there is any substance" to the plaintiff's specific factual allegations. *Id.* at 1438.

Rather than looking further back, as Chief Judge Edwards does, to the concern expressed in *Hobson*, 737 F.2d at 30-31,

that "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage," we should go forward along the path to which Justice Ginsburg pointed us in *Martin*. Consideration of the social costs associated with litigation against public officials (which, as *Harlow* teaches, weighs heavily against discovery) should constrain to this extent the district court's discretion to continue a summary judgment motion pending discovery: If, when the defendant moves for summary judgment, the plaintiff cannot present evidence that would support a jury in finding that the defendant acted with an unconstitutional motive, then the district court should grant the motion for summary judgment unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive.

Chief Judge Edwards too speaks of requiring a "reasonable likelihood that additional discovery will uncover evidence to buttress the claim," but that is not the same as requiring a reasonable likelihood, based upon specific evidence within the plaintiff's command, that discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor. Moreover, the Chief Judge's emphasis upon some plaintiffs' ability to "paint only with a broad and speculative brush," and upon the district court's almost unfettered discretion (in the mine-run of cases, that is) to continue a summary judgment motion pending discovery, suggests a substantial difference in our expectations of the district court.

Permitting a plaintiff to pursue limited discovery only upon showing that he has a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive would leave more

space for discovery than would Judge Williams or Judge Silberman, would still protect the public from the costs of pointless discovery against Government officials, and would not usurp the district court's authority over the course of the litigation. Moreover, I see no reason to doubt the district court's willingness or ability to strike anew in each case the balance that underlies the doctrine of qualified immunity. Indeed, a district judge, whose experience with the management of discovery is far more extensive than ours, whose familiarity with the case and with the litigants is more immediate, and whose tools for controlling the course of litigation are more subtle and precise, is eminently qualified for this task.

II. Application to this Case

I agree with my colleagues who conclude that Crawford-El adequately alleged a violation of clearly established constitutional law and that we must therefore remand this case to the district court. But if on remand Britton moves for summary judgment prior to discovery and Crawford-El cannot substantially supplement the record now before us, then it would be an abuse of discretion for the district court to deny the motion or to continue it pending discovery.

A. The Summary Judgment Standard

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986), the Supreme Court explained how a district court should determine whether a plaintiff has submitted evidence sufficient to withstand a summary judgment motion when the plaintiff must prove an element of his claim—in that libel case it was actual malice—by clear and convincing evidence:

> [T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to

> allow a rational finder of fact to find actual malice by clear and convincing evidence.
>
> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.... It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.
>
> Our holding that the clear-and- convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor....
>
> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.... Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Thus, although the plaintiff is entitled to have all rational inferences drawn in his favor on intermediate facts—such as

hostility, in this case—those facts must add up to clear and convincing evidence of the ultimate facts that he must prove—here, that Britton (1) in order to retaliate against Crawford-El for exercising his constitutional rights (2) knowingly gave Crawford-El's legal papers to his brother-in-law.

B. Crawford-El's Complaint

Let us now look at Crawford-El's sworn declarations to see whether they are sufficient to withstand Britton's no doubt imminent motion for summary judgment. In paragraph 6 of his fourth amended complaint, Crawford-El declares that

> [1] Ms. Britton persistently displayed toward prisoners a cavalier attitude—manifesting a view that prisoners were beneath her, disentitled to dignity, and unworthy of civil treatment. [2] Ms. Britton was hostile to plaintiff, in particular, because she knew plaintiff ... had been in charge of the law library [and] had helped many prisoners prepare ... grievance forms or appeals of disciplinary actions, and had a reputation for asserting legal rights and knowing the administrative procedures for doing so. [3] Ms. Britton deemed plaintiff "too big for his britches."

The first sentence establishes merely that Britton did not like prisoners generally; it says nothing specific about her alleged unconstitutional motive. The second sentence states a fact about Britton's state of mind, to which Crawford-El may not testify without laying a foundation. *See* Fed.R.Civ.Pro. 56(e) ("affidavits shall be made on personal knowledge"); and Fed.R.Evid. 602 (accord) and 701 ("testimony in the form of opinions or inferences is limited to those opinions or inferences which are ... rationally based on the perception of the witness"). The third sentence, provided without context, does not tell us why Britton said that Crawford-El was "too

big for his britches" or even whether the statement manifests hostility.

In paragraph 9 of the complaint, Crawford-El declares that

> Ms. Britton was among those who were hostile to the Inmate Grievance Committee and to plaintiff's efforts to seek redress of prisoner grievances. On one occasion when plaintiff was typing [Housing and Adjustment] Board papers in the Q Block office, Ms. Britton came in and said to Cpt. (then Lt.) Brummell in a caustic manner that she (Cpt. Brummell) should watch out for plaintiff and make sure he wasn't using the typewriter to write up [grievance forms] or lawsuits. As Ms. Britton said this she stood over plaintiff to see what he was typing.

Britton's concern, even if caustically expressed, that Crawford-El not conduct his jailhouse law practice when he was supposed to be performing administrative work is not evidence of hostility to Crawford-El's efforts to seek redress of prisoner grievances.

In paragraph 12 of the complaint, Crawford-El declares that

> The day after the [first *Washington Post*] article was published [April 21, 1986], defendant Britton ordered plaintiff into her office. Corporal Barrett, then Officer in Charge of Dorm K2, escorted plaintiff there. Ms. Britton was visibly upset. After ignoring plaintiff for a considerable period, she asked him if he had arranged the visit by the reporter. When plaintiff said that he had, she asked him how he had done it. Plaintiff showed her the visitor application naming the reporters invited and their address and pointed out that Ms. Britton had approved the application. [7] Ms. Britton became enraged and accused

> plaintiff of tricking her. Plaintiff denied tricking her. [9] Ms. Britton said plaintiff had embarrassed her before her coworkers by having the reporter come. Ms. Britton made a telephone call trying to get plaintiff placed in restrictive confinement in Q Block. [11] When this effort failed she said that so long as plaintiff was incarcerated she was going to do everything she had to do to make it as hard for him as possible. A few days later Ms. Britton had plaintiff transferred to the Department's Central Facility.

Crawford-El's statement (in the 7th sentence) that Britton "became enraged" when she thought she had been duped by Crawford-El does not help his case. On the contrary, that she was angered at being tricked—Crawford-El has no constitutional right to trick his keeper—provides a qualifying context for Crawford-El's most significant declarations: that Britton said that she was embarrassed by the article and that she would make life hard for Crawford-El.

Judge Williams brushes the allegations aside as "self-serving." Self-serving opinions, inferences, and conclusions without a basis in perceptible fact may not be sufficient to withstand a summary judgment motion even under the mere preponderance standard; but neither is summary judgment "a procedure for resolving a swearing contest" over concrete facts, *see Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (Posner, J.) (§ 1983 action against prison officials), should such a contest arise—Britton has not contradicted Crawford-El's declaration with her own sworn statement. Recall *Anderson*, in which the Supreme Court instructed, again on a summary judgment motion in a case where the plaintiff must prove an element by clear and convincing evidence, that "[c]redibility determinations ... are jury functions, not those of a judge," and that "[t]he evidence of the non-movant is to be believed."

Suppose Britton (or Corporal Barrett) were to corroborate the alleged threat, however; without more it would not clearly and convincingly indicate that Britton's decision to deliver Crawford-El's property to his brother-in-law was unconstitutionally motivated. Britton allegedly made the threat in a moment of anger in April 1986; she delivered Crawford-El's property to his brother-in-law in September 1989, at the same time (according to Crawford-El's own declaration) that she was calling the families of other prisoners, who, like Crawford-El, were being sent to the federal prison in Petersburg, Virginia and threatening to discard the prisoner's property if a family member did not come to collect it.

In paragraph 15 of the complaint, Crawford-El declares that

> [During a transfer to the Spokane County Jail in Washington State] Correctional Officer Ballard, with Ms. Britton's knowledge, made a videotape of [ ] prisoners [including Crawford-El] while they were handcuffed, leg-shackled, and chained about their waists. Plaintiff and several others protested to Ms. Britton that the videotaping violated thir privacy rights. Plaintiff said to her that the videotaping could not be done without the prisoners' written authorization. Ms. Britton responded, "You're a prisoner, you don't have any rights."

What does this show? That Britton was generally insensitive to the constitutional rights of prisoners? Maybe. More likely it shows simply that she did not believe that a prisoner has a right not to be videotaped. In either event, it is not very probative on the question whether (nine months later) she retaliated against Crawford-El for exercising his first amendment rights.

In paragraph 17 of his complaint, Crawford-El alleges that shortly after publication of a second *Washington Post* article (December 1988) in which he was quoted on the topic of jailhouse lawyers, Britton told one Captain Manning of the Spokane County Jail (to which Crawford-El had been transferred) that Crawford-El was a "legal troublemaker." As Judge Williams observes, Britton's describing Crawford-El as a "legal troublemaker" is scant evidence of hostility. Indeed, viewed as an expression of hostility it is too mild to support the inference that she bore a grudge against Crawford-El nine months later when she gave his legal papers to his brother-in-law.

Finally, Crawford-El alleges that on August 18, 1989, when he and other prisoners told Britton that property left in her possession included important legal material, she "smirked and spoke in a cavalier manner," but "informed [Crawford-El] that she understood his need both for his personal property and his legal material and that she would personally see to it that [he] would get them." Crawford-El alleges also that upon arriving at the federal prison in Petersburg, Virginia several other D.C. prisoners informed him that Britton had asked their families to pick up their property or she would throw it away. Crawford-El offers no evidence indicating that Britton bore an unconstitutional animus toward any of these other prisoners; on the contrary, that she apparently treated the property of several prisoners in the same manner jibes with her sworn declaration that she was motivated by what she understood to be the policy of the Federal Bureau of Prisons.

In sum, even if Crawford-El were by discovery to get corroboration of every sworn declaration in his fourth amended complaint, he would not have evidence that would clearly and convincingly indicate to a reasonable jury what he must prove. At best, his evidence would establish that in a

moment of anger . April 1986, Britton threatened to retaliate against him for embarrassing her by making statements to a *Washington Post* reporter, and that as recently as December 1988 she resented his jailhouse lawyering. Crawford-El points to no evidence that Britton did anything to make good on the 1986 threat before she delivered his legal papers to his brother-in-law in September 1989, nor to anything suggesting that he could discover evidence of such rabid hostility toward him that it would constitute clear-and-convincing circumstantial evidence that Britton was retaliating against Crawford-El by treating him as she treated other similarly situated prisoners.

Under the clear-and-convincing evidence standard, no reasonable jury could find on these facts that Britton acted with an unconstitutional motive in 1989 and Crawford-El has not offered a reason to believe that more evidence can be discovered. If on remand he has nothing more significant to offer, then the plaintiff should be denied discovery and the defendant's motion for summary judgment should be granted.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

It is high time that we scuttle the awkward direct/circumstantial evidence distinction and I fully endorse the clear and convincing standard the plurality adopts in its stead. I am at a loss to understand, however, why my colleagues chose this case to do so. Despite repeated opportunities to replead below, both pro se and through appointed counsel, the plaintiff has failed, as he has so many times before,[1] to allege facts demonstrating the deprivation of any constitutional right (clearly established or not).[2] In short, his constitutional claims are frivolous and the district court would have done well to dismiss the complaint *sua sponte* under the *in forma pauperis* statute, either before or after our first remand. *See* 28 U.S.C. § 1915(d) (authorizing district court to dismiss *in forma pauperis* suit "if satisfied that the action is frivolous or malicious"). Nevertheless, my

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[1] *See, e.g., Best v. District of Columbia*, No. 92-7196 (D.C. Cir. 1995) (summarily affirming district court's dismissal of claim of wrongful videotaping of prisoners); *Crawford-El v. Meese*, No. 88-8034 (D.C. Cir. 1990) (summarily affirming dismissal of challenge to prison diet); *Crawford-El v. District of Columbia Dep't of Corrections*, No. 91-2413 (D.D.C. 1992) (dismissing claim for damages resulting from snakebite allegedly caused by guards' negligence); *Crawford-El v. Barry*, No. 88-0715, (D.D.C. 1989) (*sua sponte* dismissing claims of wrongful deprivation of visitation privileges and of denial of prison religious classes); *Crawford-El v. Shapiro*, No 88-2339 (D.D.C. 1988) (dismissing malpractice claim).

[2] *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (finding qualified immunity where plaintiff "failed not only to allege the violation of a constitutional right that was clearly established at the time of [the defendant's] actions, but also to establish the violation of any constitutional right at all").

colleagues choose yet again to ignore the hopeless infirmity of the plaintiff's claims and insist on maintaining life support. On remand, the district court will no doubt at long last lay the plaintiff 's meritless claims to rest. I would have pulled the plug long ago.

The gist of the plaintiff's retaliation claim is this: In September 1989 defendant Britton handed the plaintiff 's belongings over to his brother-in-law rather than sending them directly to his new penal home, intending thereby to wreak vengeance upon the plaintiff for speaking to the press in 1986 and 1988. This is absurd. The only allegation that even suggests a retaliatory motive is that more than three years earlier, on April 21, 1986, the day after the first article was published, Britton accused the plaintiff of tricking her into signing the reporter's visitor's pass and made a general threat that she would "do everything she had to to make it as hard for him as possible."[3] Whatever probative force the alleged threat might otherwise have is undercut by the length of time that elapsed before the "diversion" of the plaintiff 's property. The plaintiff 's own factual allegations, on the other hand, reveal an innocent, even beneficent, motive for Britton's handling of the plaintiff 's property. According to the fourth amended complaint, the plaintiff 's brother-in-law, who was employed at the Department of Corrections, "informed plaintiff that he had been called by Ms. Britton, that she had told him she was concerned about his legal material and other property, that she was afraid that the property might get lost

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[3] The complaint does contain several allegations which, if true, may indicate Britton's general hostility toward the plaintiff and growing impatience with his complaints and litigiousness. While such evidence might support the plaintiff's now defunct claim of interference with his first amendment right to petition the court, it does not demonstrate intent to retaliate for the press interviews.

were she to send it from her office to the Lorton Property Officer for mailing to plaintiff." Appellant's App. 24-25. Thus, it appears Britton simply wanted to ensure that the property reached the plaintiff promptly and intact. And it would have had not the plaintiff himself prevented its delivery. In any event, intent aside, what Britton did had the effect of providing the plaintiff with exactly what he claims he wanted: prompt access to his property, if not in the precise manner he would have chosen (or at the taxpayer's expense). Thus, the complaint's claim of unconstitutional retaliation is "nonsensical on its face." *See Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (so characterizing inmate's complaint claiming unconstitutional reprisal by prison officials who, after he requested "protective custody," placed him in segregation, which, as the court noted, gave him "the protective custody he requested or its approximate equivalent").

Even assuming, against common sense, that Britton's handling of the plaintiff 's property amounted to some sort of punishment, he has no claim under 42 U.S.C. § 1983. As the panel noted in the plaintiff 's first appeal, there is a "general principle that some showing of injury is a prerequisite to a constitutional tort action." *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991) (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)) (*Crawford-El* I). In addition, the injury must be of constitutional dimension: "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). The plaintiff's retaliation claim is below the *de minimis* level. The only alleged injuries attributable to Britton are the costs of mailing three boxes of belongings to Florida—incurred when the plaintiff finally allowed his mother to send them—and, perhaps, a brief delay in receiving them and the consequent cost of temporarily replacing a few items, as well as the emotional distress

flowing therefrom.[4] Such slight harm does not cross the constitutional threshold. *Cf. Buthy v. Commissioner of Office of Mental Health*, 818 F.2d 1046, 1050 (2d Cir. 1987) (holding that state mental institution rule requiring forensic unit patients to remain awake for fixed 16-hour period is "a *de minimis* imposition on individual liberty" that cannot support due process claim); *Walsh v. Louisiana High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980) (rejecting student's challenge to "student transfer rule," making student attending high school outside his home district ineligible to participate in interscholastic athletics for one year, because of "the *de minimis* nature of the burden placed on the plaintiffs' free exercise of religion"). It is therefore redressable, if at all, through a local conversion suit, not in federal court under section 1983. *See Crawford-El* I, 951 F.2d at 1318 ("At worst, the act might constitute a common law conversion...."); *Paul v. Davis*, 424 U.S. 693, 699-701 (1976) (state law tort does not a constitutional deprivation make).

It is true that an ordinarily permissible act may become a constitutional deprivation if performed in retaliation for the exercise of a first amendment right. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972) (decision not to renew untenured professor's contract); *Cornell v. Woods*, 69 F.3d 1383, 1387-88 (8th Cir.1995) (transfer of inmate to different prison); *Meriwether v. Coughlin*, 879 F.2d 1037 (2d Cir.1989) (change in inmate's work assignment); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989) (filing disciplinary charges). The threshold injury requirement nevertheless remains. A retaliation claim is actionable precisely "because

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[4] Any other damages resulted not from Britton's decision but from the plaintiff's own intransigence. It is even doubtful that he would have suffered delay or replacement costs if he had allowed his mother to forward his belongings promptly.

retaliatory actions may tend to chill individuals' exercise of constitutional rights." *American Civil Liberties Union of Md., Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (citing *Perry v. Sindermann*, 408 U.S. at 597). Thus, the "test" for whether one exists "is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *McGill v. Board of Educ.*, 602 F.2d 774, 780 (7th Cir. 1979) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)); *see also DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1994) ("Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise."). The plaintiff's claim flunks the test. It is difficult to imagine that the minimal adverse effect (if any) of Britton's actions was likely to chill or deter him (or any reasonable person) from exercising his first amendment rights. Thus, even if retaliatory, Britton's conduct cannot give rise to a constitutional cause of action. *See DiMeglio v. Haines*, 45 F.3d at 806-07 (stating that claim of retaliatory reassignment of zoning investigator "to a geographic subset of the very region from which he formerly had derived his zoning assignments" "likely would not be sufficiently adverse to implicate the First Amendment"); *Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257 (5th Cir. March Unit A 1981) (holding that student's claim of retaliatory lowering of algebra grade, resulting in "insignificant decrease in her overall grade point average" that did not affect her class rank, was "patently insubstantial").

In sum, the plaintiff's meritless claims should have been long since booted and, in any event, should never have been

dignified with *en banc* review. Nevertheless, the issues have been joined and I concur in the plurality's disposition of them.

EDWARDS, *Chief Judge*, with whom WALD, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*, concur, concurring in the judgment to remand: Justice Felix Frankfurter once wrote:

> [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947). This admonition has been thoroughly lost on my colleagues who have a different view of this case. Without any directive from Congress or mandate from the Supreme Court, my colleagues run roughshod over the Federal Rules of Civil Procedure and invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would *never* be able to survive a defendant's assertion of qualified immunity. This result is both unfathomable and astonishing.

Fortunately, a clear majority of the court agrees that plaintiffs who file constitutional tort claims alleging that governmental officials acted with unconstitutional intent are not obligated to meet any form of heightened pleading standard in their initial complaint. Rather, it is clear that plaintiffs need only adhere to the basic notice pleading requirements of Federal Rule of Civil Procedure 8(c), and need not anticipate an affirmative defense of qualified immunity. Further, the opinions of the court make it clear that we reject any heightened pleading rule that would require plaintiffs to plead *direct*, rather than *circumstantial*, evidence.

However, I strongly disagree with Judge Williams's and Judge Henderson's opinions suggesting that, in the face of a defendant's claim for qualified immunity, a plaintiff faces dismissal (even without any discovery) unless he or she can put forward specific, nonconclusory factual allegations establishing the defendant's unconstitutional intent by *"clear and convincing" evidence*. I similarly reject Judge Silberman's opinion that would go even further and completely rewrite the law to say that a motive-based claim can never survive a motion to dismiss so long as the defendant's behavior can be seen as consistent with *any* possible legal motivation, *i.e.*, without regard to whether it can be demonstrated that the presumed legal motivation is not what actually prompted the actions that are at issue.

It is not surprising that these opinions (along with the separate opinion of Judge Ginsburg) can find no safe path to common ground. These opinions offer judgments that are in complete defiance of the Federal Rules of Civil Procedure, inventing evidentiary standards out of whole cloth and overlaying them onto the established procedures for adjudicating lawsuits in our federal courts. Because there is no principled basis for these judgments, the opinions flounder in their rationales and command no majority position.[1] There

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[1] Although all members of the court appear to agree that this case must be remanded for further proceedings, the court is sharply divided over the basis for remand. Judge Williams suggests that Judge Ginsburg's opinion (pursuant to which Crawford-El might get discovery) provides a "common denominator" of the reasoning of a majority, as the opinion consistent with the disposition on the narrowest grounds. Whether or not Judge Ginsburg's opinion controls, it is clear that a majority of the court agrees that the trial judge must have discretion to consider the appropriate circumstances under which discovery should be allowed.

are some telling similarities in the opinions, for each suffers from the same glaring infirmities: the opinions are completely unmoored to any legislative enactment or Supreme Court precedent, and they are contrary to the law of every other court of appeals in the nation. The net result is judicial activism at its most extreme. Because I believe that this court has no authority to amend the Federal Rules and to ignore established precedent, I reject the positions offered by my colleagues.

* * * *

A. This Circuit's Jurisprudence

The issue raised by this case is not a new one. Ever since the Supreme Court's opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that government officials generally can be held liable for civil damages only if they "violate clearly established statutory or constitutional rights," *id.* at 818, federal appeals courts have been forced to apply the principles of *Harlow* to cases in which plaintiffs allege that defendants took action against them with unconstitutional motivation. The difficulty with these cases is that, in some instances,

> plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent.

Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

In order to prevent frivolous claims from reaching such an advanced stage in the proceedings, the *Hobson* court required that these motive-based complaints provide "nonconclusory

allegations of evidence of such intent" in order to survive a motion to dismiss and proceed to discovery. *Id.* According to the court, "[t]he allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response." *Id.* Unlike the rule proposed by Judge Williams, this test did *not* create a new judge-made evidentiary standard, but was simply a "firm application of the Federal Rules of Civil Procedure," as called for by the Supreme Court in *Harlow*, 457 U.S. at 819-20 n.35 (internal quotation omitted). Moreover, in *Hobson*, we noted that, "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule ... could lead to dismissal of meritorious claims;" we therefore warned district court judges to act cautiously and dismiss only those claims that were "devoid of factual support." *Hobson*, 737 F.2d at 30-31.

In subsequent cases, this court, while purporting to remain faithful to *Hobson*, appeared to invent a new requirement, that plaintiffs plead only direct, as opposed to circumstantial, evidence of defendants' unconstitutional motivation. Given that the Supreme Court has stated that the probative value of circumstantial evidence "is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and that such evidence can in some cases be "more certain, satisfying and persuasive than direct evidence," *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960), the so-called direct-evidence rule never has made any sense. I therefore join my colleagues in emphatically rejecting such an illogical and unjustified requirement. I also agree with my colleagues that any evidentiary standard to be applied on a motion for summary judgment must be applied consistently at every subsequent stage of the proceedings before the trial court. Otherwise, as with the direct evidence

rule, plaintiffs would face a higher burden to survive a pre-trial motion than they would face in order to prevail at trial.

Having corrected our wrong turn towards a direct-evidence rule, we should not now reach out and invent yet another arbitrary and unjust standard. The correct decision in this case is to return to the sound principles set forth by the court in *Hobson*.

B. The ***Hobson*** Standard

Although this court has sometimes referred to the rule enunciated in *Hobson* as a "heightened pleading standard," *see, e.g., Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991); *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986), that label is misleading because application of the *Hobson* principles *does not* necessarily affect what the plaintiff must put in the complaint. Indeed, the Supreme Court made it clear in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), that, as a matter of substantive law, "two—and only two—allegations are required in order to state a cause of action" under 42 U.S.C. § 1983 (1994). A plaintiff must allege only that the defendant "has deprived him of a federal right" and has "acted under color of state or territorial law." *Gomez*, 446 U.S. at 640. A defendant's qualified immunity is an affirmative defense, and, therefore, "the burden of pleading it rests with the defendant" under the Federal Rules, which provide that the defendant must plead any " "matter constituting an avoidance or affirmative defense.' " *Id.* (quoting FED. R. CIV. P. 8(c)). Thus, pursuant to *Gomez*, a plaintiff has no obligation to anticipate or respond to a potential qualified immunity defense in the initial complaint.

Once the defendant actually asserts the qualified immunity defense, however, the court must then determine whether the plaintiff can offer a sufficient factual basis to support the allegations of unconstitutional animus and therefore overcome qualified immunity. Under the Federal Rules, there are a number of appropriate mechanisms available by which the plaintiff can provide this additional factual support. For example, pursuant to Rule 7(a),[2] the plaintiff may file a reply that sets out the plaintiff's evidence relevant to immunity and the material that the plaintiff claims is reasonably likely to lead to pertinent additional evidence. *See Schultea v. Wood*, 47 F.3d 1427, 1432-33 (5th Cir. 1995) (en banc). Alternatively, the plaintiff may file an amended complaint[3] or a more definite statement,[4] or the court can use its discretionary power over discovery under Rule 26(b) to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity.[5] In any of these scenarios, the trial court is able to

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[2] Federal Rule of Civil Procedure 7(a) states that "the court may order a reply to an answer or a third-party answer."

[3] Federal Rule of Civil Procedure 15(a) permits a party to amend its complaint at any time "by leave of court."

[4] Federal Rule of Civil Procedure 12(e) permits a Motion for More Definite Statement if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

[5] Federal Rule of Civil Procedure 26(b)(2)(iii) permits the court to alter the limits on discovery if the trial judge determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the

evaluate the nature of the plaintiff's allegations concerning unconstitutional intent, prior to ruling on a defense motion for summary judgment.

Thus, rather than refer to the *Hobson* test as a heightened pleading requirement, I agree with Judge Easterbrook that we should "speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992). Under the principles enunciated in *Hobson*, plaintiffs can survive an initial motion for summary judgment, prior to discovery, by providing "nonconclusory allegations of evidence" of the defendant's unconstitutional intent.

Hobson also rightly recognized that the courts should be cautious in applying this standard, lest meritorious claims be dismissed. For example, it will sometimes be the case that the relevant evidence is in the possession of the defendant and is therefore unavailable to the plaintiff without further discovery. Thus, if the plaintiff can show a reasonable likelihood that additional discovery will uncover evidence to buttress the claim, the trial judge may invoke Rule 56(f) and deny the summary judgment motion.[6]

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litigation, and the importance of the proposed discovery in resolving the issues."

[6] Federal Rule of Civil Procedure 56(f) expressly grants the trial judge broad discretion to order discovery prior to ruling on a summary judgment motion, where the party opposing the motion cannot "present by affidavit facts essential to justify the party's opposition." This court has explicitly held that the decision whether or not to stay discovery pursuant to Rule 56(f) is committed to the sound discretion of the District Court. *White v. Fraternal Order of Police*, 909 F.2d 512,

These procedures are part of the standard apparatus provided by the Federal Rules to enable trial judges in civil suits to differentiate meritorious claims from frivolous ones, and the Supreme Court has *never* suggested that this same apparatus is somehow inadequate when it comes to the particular immunity concerns expressed in *Harlow*. Indeed, as Justice Kennedy has pointed out, the objective standard for qualified immunity articulated in *Harlow* was based on the fact that the standards for summary judgment at the time "made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Now, however, "subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). As a result, Rule 56 is now more than adequate to dispose of unmeritorious claims without appellate judges taking it upon themselves to invent new evidentiary standards designed to address particular categories of cases.

C. The Proposed Standard

Judge Williams's opinion argues that its Draconian rule requiring "clear and convincing" evidence is necessary to vindicate the *substantive right* of qualified immunity. I am inclined to agree with the view of the Seventh Circuit that "it

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517 (D.C. Cir. 1990). Yet, the new evidentiary standard proposed by Judge Williams would effectively strip the trial judge of this discretion, by denying *any* discovery to plaintiffs unless they can provide "clear and convincing" evidence prior to discovery.

is hard to depict a "right not to be tried' " as a substantive, rather than procedural, right. *Elliott*, 937 F.2d at 345. However, even were I to assume that qualified immunity is a substantive right, there is no valid justification for requiring plaintiffs to satisfy a "clear and convincing" evidence test in the cases here at issue. Indeed, there is great irony in the judgment offered by those judges who subscribe to Judge Williams's opinion, for the new rule that they propose would have a devastating impact on potential plaintiffs who already face substantial burdens in attempting to pursue civil rights claims. Recognizing these burdens, Chief Judge Posner has argued that there is a "peculiar perversity" in imposing a heightened standard in cases involving prison inmates because "it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so" due to the fact that prisoners have no power to investigate their claims and gather evidence prior to obtaining discovery. *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 789-90 (7th Cir. 1995); *see also* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 647 (1989) (The author argues that, in a case where the motive underlying a defendant's actions is a fact solely within the knowledge of the defendant, a court could not fairly grant defendant's motion for summary judgment before plaintiff has been given an opportunity to conduct discovery on this issue.). Thus, with regard to such cases, the standard proposed by Judge Williams, while purporting to permit some intent-based qualified immunity claims, would, as a practical matter, make it virtually impossible for these claims ever to survive a motion to dismiss. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 63 (1989) ("Where the plaintiff must establish the culpability element as part of the constitutional claim, denial of discovery on this issue would make it impossible to prove certain cases.").

In reading the opinions by Judge Williams and Judge Henderson, one is left with the impression that a "clear and convincing" standard is deemed necessary because, without it, some plaintiffs in section 1983 cases might actually prevail on their claims. Yet, it is overwhelmingly clear that the Court in *Harlow* never for a moment intended to insulate government officials from liability in all cases where the official's state of mind is a necessary element of the constitutional violation alleged. In fact, in *Harlow* itself the plaintiff alleged that the defendants had violated his First Amendment rights by dismissing him in retaliation for testifying before a congressional committee. As then-Judge Ruth Bader Ginsburg has pointed out,

> [h]ad the Court intended its formulation of the qualified immunity defense to foreclose *all* inquiry into the defendants' state of mind, the Court might have instructed the entry of judgment for defendants ... on the constitutional claim without further ado. In fact, the Court returned the case to the district court in an open-ended remand, a disposition hardly consistent with a firm intent to delete the state of mind inquiry from every constitutional tort calculus.

Martin v. District of Columbia Metro. Police Dep't, 812 F.2d 1425, 1432 (D.C. Cir.), *vacated in part*, 817 F.2d 144 (D.C. Cir.), *reinstated*, 824 F.2d 1240 (D.C. Cir. 1987).

Moreover, if a "clear and convincing" evidence standard were truly necessary to vindicate defendants' alleged substantive right not to be tried, as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed, although nearly every other federal appeals court in the nation has addressed the precise issue that we face today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view

this case differently. Instead, all ten circuits that have addressed the issue have adopted formulations that are essentially identical to the one laid out in *Hobson* and echoed in Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.").[7]

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[7] Although some of the circuit courts have actually adopted some form of so-called "heightened pleading" requirement and have chosen to test the plaintiff's claims at the complaint stage (an approach that I believe runs counter to *Gomez*), the more important point is that, regardless of when they apply the test, the courts have been quite consistent in articulating the appropriate evidentiary burden. *See Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995) ("[T]he plaintiff must proffer particularized evidence of direct or circumstantial facts ... supporting the claim of an improper motive in order to avoid summary judgment."); *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988) ("The dual policy concerns of protecting state officials from a deluge of frivolous claims and providing state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings have led us to impose on section 1983 claims the additional pleading requirement that the complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." (internal quotation omitted)), *cert. denied*, 489 U.S. 1065 (1989); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc) ("To avoid evisceration of the purposes of qualified immunity ... plaintiffs alleging unlawful intent ... [must] plead specific facts in a nonconclusory fashion to survive a motion to dismiss."); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc) ("The district court need not allow any discovery unless it finds that plaintiff has

supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts."); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995) (Plaintiff must respond to an assertion of qualified immunity with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity."); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) ("[T]he plaintiff [is required] to produce specific, nonconclusory factual allegations which establish the necessary mental state, or face dismissal." (internal quotation and alteration omitted)), *cert. denied*, 502 U.S. 1121 (1992); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995) ("Complaints seeking damages against governmental officials ... are subject to a heightened standard of pleading with sufficient specificity to put defendants on notice of the nature of the claim."); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) ("We believe a requirement that a plaintiff must put forward nonconclusory allegations of subjective motivation ... satisfies *Harlow*'s directive that government officials should be shielded from "insubstantial' lawsuits, while at the same time preserving the opportunity for plaintiffs to pursue meritorious claims."); *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994) ("To survive a summary judgment motion, a plaintiff must point to specific evidence showing the official's actions were improperly motivated."); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) ("In pleading a section 1983 action, some factual detail is necessary."), *cert. denied*, 507 U.S. 987 (1993). The First Circuit has not adopted a particular formulation of the standard, but instead has made it clear that intent-based claims can be sufficient to overcome qualified immunity, *see Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 46 (1st Cir. 1988), and has indicated that motions for summary judgment

Further, we have been presented with no evidence to indicate that, under these formulations, government officials around the country are being subjected to intolerable litigation burdens from intent-based civil rights suits or that district court judges are routinely permitting frivolous claims to go forward.[8] Indeed, it is worth noting that neither the Solicitor General nor the government defendants themselves even advocated a "clear and convincing" evidence standard in their submissions to this court.[9]

A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed

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in qualified immunity cases will be handled under the Federal Rules just like any other case, *see Alexis v. McDonald's Restaurants of Mass.*, 67 F.3d 341, 348-49 n.7 (1st Cir. 1995). Thus, no other federal jurisdiction operates under a standard even approaching the harshness of the positions endorsed by the judges who view this case differently.

[8] To the contrary, at least one empirical study of constitutional tort litigation concludes that "the image of a civil rights litigation explosion is overstated and borders on myth." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643 (1987).

[9] Although the brief of J. Michael Quinlan and Loye W. Miller, Jr., as *amici curiae*, does suggest a "clear and convincing" standard as a possible alternative to the direct evidence rule, *amici* offer no legal precedent requiring or supporting such a standard, arguing instead that, as a policy matter, the proposed standard would be appropriate given "the venerable principle that government officials are presumed to act in good faith." Brief of J. Michael Quinlan and Loye W. Miller, Jr. as Amici Curiae at 25.

by the Supreme Court, and (contrary to the suggestion in Judge Williams's opinion) *Harlow* itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in *Harlow* stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n.35 (internal quotations omitted). Thus, nothing in *Harlow* gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.

Furthermore, the recent case of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), broadly *repudiates* the use of heightened, judge-made standards to fulfill policy-related goals such as those advanced by the judges who view this case differently. Although *Leatherman* addressed only claims against municipalities, it is significant that the Court explicitly rejected the justifications for a heightened standard that had been offered by the defendants, and instead insisted that the Federal Rules remain the sole touchstone for determining the sufficiency of the plaintiff's case. As the Court stated, additional requirements can be imposed only "by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 168.

Finally, my colleagues' attempt to justify a clear and convincing evidence standard by reference to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is in vain. In that case, nothing less than the First Amendment's guarantee of freedom of the press was at stake, and the Court concluded that this vital interest, enshrined in the Bill of Rights, justified a heightened evidentiary burden. *See, e.g., id.*, at 270 ("[W]e consider this case against the background of a profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."). Given that there is no analogous *constitutional right* protecting public officials from lawsuits, this case cannot possibly qualify as a "cognate" area of law.

Despite the complete lack of judicial precedent or evidence that an alternative judicial remedy is either appropriate or necessary, the judges who view this case differently have reached out and attempted to devise new rules of law that would have devastating consequences in many civil rights lawsuits. Thus, at precisely the moment that we have finally dispensed with our absurd and anomalous direct-evidence rule, some members of the court would once again concoct an arbitrary and unfair evidentiary standard that diverges from the settled law of every other court in the land.

D. Application to This Case

Although it is far from clear whether the plaintiff in this case can prevail on the merits of his claims, his complaint is sufficient to survive motions to dismiss or for summary judgment. Prison inmate Leonard Rollon Crawford-El alleges that prison official Patricia Britton unconstitutionally retaliated against him for exercising his First Amendment rights by deliberately retaining and then misdelivering his personal items during a series of prison transfers. Far from simply appending a claim of unconstitutional motivation to an otherwise questionable claim, however, Crawford-El's complaint, as recounted by the District Court, includes several specific factual allegations:

— Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy

Procedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)

— On April 20, 1986, *The Washington Post* published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She threatened to make life hard for him in jail any way she could. (Fourth Amended Complaint, at ¶ 12.)

— Britton stated on another occasion that prisoners like Crawford-El "don't have any rights." (Fourth Amended Complaint, at ¶ 15.)

— After the publication of a second *Washington Post* article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were "jailhouse lawyers'—troublemaking "writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect, Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at WW 16-17.) *Crawford-El v. Britton*, 844 F. Supp. 795, 802-03 (D.D.C. 1994).

Based on these and other allegations, the trial judge concluded that a jury "might reasonably infer ... that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker.' " *Id.* at 803. Thus, an experienced member of our District Court found that, under the Federal Rules of Civil Procedure, there is a legitimate case to go to the *jury*. Yet,

under the evidentiary standard proposed by several of my colleagues, Crawford-El's allegations would not be sufficient even to proceed to *discovery*. Nothing in the Supreme Court's qualified immunity jurisprudence justifies such a result; indeed, it would appear that Crawford-El's complaint would survive a motion for summary judgment under the rules adopted by every other court of appeals in the nation.

CONCLUSION

Given the lack of any Supreme Court decision indicating that a "clear and convincing" standard can or should be invented by judges and overlaid onto the Federal Rules of Civil Procedure, the result proposed by the judges who view this case differently suggests an extraordinary use of judicial authority. One would have thought that the outcome they propose would be anathema to judges who advocate a philosophy of judicial restraint, particularly when the more prudent course is to insist on a firm application of the Federal Rules until such a time as the Supreme Court commands us to do otherwise, or an amendment is made either to the Federal Rules or to section 1983 itself. "[J]ust as masons building a cathedral should not supplant the architect, even though both are creating a work of art, a judge should not supplant the politician or administrator though all are seeking sound governance." Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1111 (1991); *see also, e.g.*, Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 821-22 (1990) ("decr[ying] the extraordinary expansion of judicial power in the latter half of this century," and observing that the one concept that most distinguishes those who advocate "judicial restraint" is "avoidance of judicial policy making").

The simple truth here is that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388

(1971), and its progeny (not to mention the Civil Rights Act of 1871), remain the law of the land and control the actions of this court. And, as Justice Kennedy recently pointed out, courts must be cautious about "devising limitations to a remedial statute, enacted by Congress, which "on its face does not provide for *any* immunities.' " *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). I therefore find it incredible that some members of this court seek to create new rules that would effectively render impossible all *Bivens*-type civil rights actions that turn on the intent of government officials. Until the Supreme Court finally resolves the question once and for all, it appears that this circuit might sit alone among all the federal courts of appeal in its approach to this issue.

Citizens of the United States who legitimately use the legal system to render representatives of their government accountable for unconstitutional action should not find the courthouse door in our nation's capital slammed shut. I hope that will not be the consequence of today's decision.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia, **FILED AUG 28 1996**

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD** AND **RANDOLPH**, Circuit Judges.

JUDGMENT

It is **ORDERED**, on the Court's own motion, that, for the reasons stated in the accompanying memorandum opinion, it is

ORDERED and ADJUDGED that the case is remanded to the District Court for further proceedings.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert F. Bonner

Deputy Clerk

MEMORANDUM

Although the *en banc* court has now disposed of the First Amendment retaliation claim brought against defendant Britton, *Crawford-El v. Britton*, No. 94-7203 (D.C. Cir. August 27, 1996) (en banc), we remand to the District Court for further consideration of defendants' motions to dismiss the claim against the District of Columbia and the common-law conversion claim.

Although the District Court originally dismissed the claims against the District, the District was named as a defendant in subsequent amended complaints, and the District never objected. *See Crawford-El v. Britton*, Civ. Action No. 89-3076, slip op. at 1 n.1 (D.D.C. Feb. 15, 1994), *reprinted in* App. 34. Moreover, the District has never disputed its joinder as a defendant in any proceedings before this court. Thus, we agree with the determination of the trial judge that the District of Columbia remains a party in this case.

Further, the claims against the District were not before the *en banc* court, which addressed only the issues of the proper pleading and evidentiary burdens in cases against government officials who assert qualified immunity. The District of Columbia is a municipality, and it is undisputed that "municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507

U.S. 163, 166 (1993). Thus the decision of the *en banc* court does not dispose of the claim against the District.

The District Court dismissed the claims against the District, reasoning that, "[b]ecause Crawford-El has not shown that Britton committed any constitutional violations, the District cannot be held liable for her acts." *Crawford-El v. Britton*, 844 F. Supp. 795, 807 n.16 (D.D.C. 1994). However, this analysis incorrectly ties together the potential liability of Britton and the District. Contrary to the District Court's suggestion, the claim against the District does *not* rise or fall with the resolution of the claim against Britton. Because the District is not entitled to qualified immunity, the claim against the city must be analyzed under a different standard.

It is well-settled that, "When execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). Moreover, the Supreme Court has made it clear that a federal court may not apply any form of heightened pleading standard in civil rights cases alleging municipal liability. *Leatherman*, 507 U.S. at 164. Thus, Crawford-El's claims against the District must be evaluated according to the usual standard used in ruling on defense motions to dismiss.

As a result, the fact that Crawford-El's claims against Britton herself do not survive the heightened evidentiary burden imposed by the *en banc* court does not determine whether or not his claim against the District can proceed. We therefore remand so that the District Court can decide if Crawford-El has alleged sufficient facts to survive a motion to dismiss on the question of whether a municipal policy or

custom caused a constitutional violation. The District Court then must determine whether or not to exercise jurisdiction over the pendent common-law conversion claim.

So ordered.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia,

FILED NOV 28 1995

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD** and **RANDOLPH**, Circuit Judges.

JUDGMENT

This cause came to be heard from an order of the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum it is

ORDERED and **ADJUDGED** that the District Court's order dismissing appellant's claims of denial of his First Amendment right to petition and his Fifth Amendment right to procedural due processs is affirmed. Review of his First Amendment retaliation claim is reserved for resolution by the *en banc* court. Jurisdiction over appellant's pendent common law claim for conversion depends upon the *en banc* court's ultimate judgment regarding the remaining federal claim.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown

Deputy Clerk

MEMORANDUM

Appellant Leonard Rollon Crawford-El, a prison inmate, brings this action under 42 U.S.C. § 1983 (1988). Appellant claims that, in retaliation for his exercise of First Amendment rights, District of Columbia Department of Corrections official Patricia Britton withheld his property and diverted it outside government control, causing him economic loss as well as mental and emotional distress. Further, appellant alleges that, because his property contained legal materials relevant to several pending lawsuits, he was impeded in exercising his First Amendment right to petition the courts for redress of grievances. Finally appellant claims that he was denied his Fifth Amendment right to procedural due process and also asserts a common law claim for conversion.

The District Court dismissed the complaint. We affirm the dismissal of appellant's right to petition and procedural due process claims. His First Amendment retaliation claim,

however, is reserved for resolution by the *en banc* court. Supplemental jurisdiction over appellant's pendent common law claim depends upon the *en banc* court's ultimate judgment regarding the remaining federal claim.

I. BACKGROUND

A. *The Dispute*

Appellant Crawford-El is a District of Columbia prisoner who, along with several other inmates, was transferred out of the District's prison system in 1988 due to overcrowding, and then shuffled among facilities in four other states. On July 28, 1989, after having been assigned to a Washington state prison, appellant and other inmates were transferred to a federal correctional institution in Marianna, Florida, via correctional facilities in Missouri and Virginia. The inmates who were so transferred did not arrive at Marianna until September 22, 1989. At the beginning of the transfer process, the inmates were forced to surrender their property to prison officials for shipping. Crawford-El's property consisted of legal papers concerning pending federal civil and administrative actions, a photograph he believed necessary for a post-conviction motion in his criminal case, and some clothing and other miscellaneous personal articles.

Defendant Britton was the District of Columbia corrections official responsible for shipping Crawford-El's property to him during this transfer. Britton directed Washington state authorities to ship Crawford-El's property (and the property of all other prisoners who were similarly transferred) to her in Washington, D.C. She received his property in mid-September 1989. Instead of then shipping Crawford-El's boxes to him in Marianna, Britton asked Crawford-El's brother-in-law, Department of Corrections employee Jesse Carter, to retrieve the property, even though Crawford-El had

never authorized such a release. After Carter had claimed the property, Crawford-El requested that he return it to Britton so that it could be shipped to Marianna through prison channels. When Britton refused to accept a return of the property, Carter delivered it to Crawford-El's mother, who mailed the property to Crawford-El at his expense on January 24, 1990.

At first, Marianna officials would not permit Crawford-El to receive his boxes because they had been mailed to him outside of prison channels. Crawford-El was forced to submit an administrative complaint in order to retrieve the property. Not until February 1990 did he finally receive his property, about six months after he had surrendered it to prison officials in Washington state.

As a result of Britton's actions, Crawford-El alleges that he suffered mental distress and was obligated to incur the first-class mail delivery costs of shipping his property from the District of Columbia to Marianna, Florida, as well as the cost of replacing underwear, tennis shoes, soft shoes, and other items in his delayed packages. Crawford-El sued both Britton, in her individual capacity, and the District of Columbia Department of Corrections, seeking declaratory, injunctive, and monetary relief.

II. ANALYSIS

In addition to his First Amendment retaliation claim, which will be resolved in further proceedings before the *en banc* court, Crawford-El raised two other constitutional claims, both of which were properly dismissed by the District Court. First, Crawford-El asserts that, because Britton deprived him of his legal papers for a period of six months, she interfered with his First Amendment right to petition the courts for redress of his grievances. The facts supporting this claim,

however, are indistinguishable from Crawford-El's previous claim alleging denial of his Fifth Amendment right of access to courts, which was rejected by this court at an earlier stage of these proceedings. *See Crawford-El v. Britton*, 951 F.2d 1314 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992). In the initial appeal, the panel ruled that Crawford-El could not sustain an access to courts claim unless he could show a specific litigation injury. *Id.* at 1321-22. In his amended complaint, Crawford-El has merely reasserted the same non-litigation injuries and recast his losing right of access claim as a First Amendment right to petition claim. Further, appellant asserts that to sustain this new claim he need not show litigation injury. We do not decide whether such First Amendment claims always require evidence of actual effect on pending litigation, however, because in this instance, the law of the case controls. Crawford-El has offered no evidence to supplement the allegations rejected by this court on the first appeal; therefore, the District Court properly dismissed this claim.

Crawford-El also raises a procedural due process claim, seeking an injunction that would prevent defendants from depriving inmates of their legal materials without providing a prompt informal hearing. The Supreme Court has ruled that, in order to determine whether any given administrative procedures are constitutionally sufficient, we must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Inmates do have a strong interest in their possession of legal materials necessary to pursue pending or contemplated litigation. In these circumstances, however, a pre-deprivation hearing would have only minimal added benefit because inmates already have other means of redress available. As the trial judge noted, inmates can always alert the courts in which their cases are pending and seek an extension of time until the legal materials are returned. If necessary, they can also petition the court for an injunction to return the legal materials withheld by prison officials. Thus, there is very little added value to providing the pre-deprivation hearing requested. Given the District of Columbia's need for efficient and secure prison transfers, the balancing test favors defendants on this issue, and the trial court properly dismissed the claim.

Finally, Crawford-El raises a common law conversion claim, which the District Court dismissed because, once all the federal claims had been rejected, the court lacked jurisdiction over the pendent, non-federal claim. The vitality of this claim, therefore depends on the final resolution of appellant's First Amendment retaliation claim. If that claim is ultimately reinstated, the District Court would be able to assert supplemental jurisdiction over the conversion claim under 28 U.S.C. § 1367 (Supp. V 1993). The District Court could then determine whether this claim should survive a motion to dismiss on the merits.

III. CONCLUSION

We affirm the District Court's dismissal of appellant's claims that he was denied his First Amendment right to petition and that he was denied his Fifth Amendment right to procedural due process. His First Amendment retaliation claim is reserved for resolution by the *en banc* court. Based

on the ultimate decision regarding that claim, the District Court may be able to assert supplemental jurisdiction over appellant's pendent common law conversion claim.

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia, **FILED** NOV 28 1995

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS,** and **TATEL**, Circuit Judges.

ORDER

If is Ordered, by the Court *in banc*, on its own motion, that the issue of a "heightened pleading standard" will be considered and decided by the court sitting *in banc*. Oral argument before the Court *in banc* will be heard at 10:00 a.m. on Wednesday, March 20, 1996.

The parties are directed to file thirty copies each of briefs and to do so in accord with the following schedule:

Appellant's Brief and Appendix	1-5-96
Appellees' Brief	2-6-96
Appellant's Reply Brief	2-20-96

The briefs shall be limited to responding to the following questions:

1. In cases where plaintiffs bring civil rights claims against Government officials who assert qualified immunity, may this circuit supplement the Federal Rules of Civil Procedure by requiring plaintiffs to satisfy a heightened pleading requirement in their complaint or face dismissal prior to discovery? If so, should it be done?

2. May this circuit require that plaintiffs who allege that Government officials acted with unconstitutional intent plead direct, as opposed to circumstantial evidence of that intent? If so, should it be done?

3. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, should the court grant a defense motion for summary judgment, made before plaintiff has conducted discovery, if the plaintiff has failed to adduce evidence from which the fact finder could reasonably infer the illicit motive? *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982); *Elliott v. Thomas*, 937 F.2d 338, 345-46 (7th Cir. 1991)?

4. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, are there any circumstances, apart from national security issues of the sort

at stake in *Halperin v. Kissinger*, 807 F.2d 180, 184-85 (D.C. Cir. 1986), where the court should grant a defense motion for summary judgment on a showing by the defendant such that a reasonable jury would necessarily conclude that the defendant's stated motivation "would have been reasonable"? *Id.* at 188; *see also id.* at 189 (summary judgment warranted where no reasonable jury could find that "it was objectively unreasonable for the defendants" to be acting for stated, innocent motives).

5. To the extent that the answers to question #2 and #4 are negative, are there any alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation?

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert F. Bonner

Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed AUG 31, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 9/1/94]

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON and,	)	
DISTRICT OF COLUMBIA,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case comes before this court on plaintiff's motion to reconsider the order entered February 15, 1994,[1] which dismissed his fourth amended complaint. Based upon the motion and a subsequently filed supplemental memorandum in support, defendants' opposition, and plaintiff's reply, this court will deny plaintiff's motion for reconsideration for the reasons stated below.

I.

[1] Crawford-El v. Britton, 844 F.Supp. 795 (D.D.C. 1994).

Plaintiff's first set of arguments seeks to support his claim of impermissible retaliation for his exercise of his First Amendment rights. In his motion to reconsider, plaintiff argues that in the District of Columbia, plaintiffs alleging unconstitutional motive need not make their case with direct--not merely circumstantial--evidence in order to meet the heightened pleading standard and survive a motion to dismiss. Plaintiff has since conceded in his reply brief that Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), forecloses this argument. The Kimberlin court held that[2]

> a plaintiff who charges a government official with a constitutional deprivation where the outcome depends on the official's state of mind . . . is subject to this circuit's so-called 'heightened pleading' standard, requiring pleading of specific direct evidence of intent to defeat a motion to dismiss. . . . Thus, [plaintiff] Kimberlin was required to proffer direct evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence.

The Court of Appeals for this Circuit has recently refused to reconsider Kimberlin,[3] but a petition for certiorari is now pending in the Supreme Court.[4]

Second, plaintiff argues that despite Kimberlin, he need not produce direct evidence to clear the heightened pleading standard because defendant Britton waived the direct

[2] Kimberlin, 6 F.3d at 793-94, 795 (emphasis in original).

[3] See Kimberlin v. Quinlan, 17 F.3d 1525 (D.C. Cir. 1994).

[4] A petition for certiorari was filed on June 22, 1994. See 63 U.S.L.W. 3009 (July 12, 1994).

evidence element of her qualified immunity defense. Although it is true that Britton may have failed to "raise the distinction" between the direct and circumstantial tests,[5] she did raise the qualified immunity defense,[6] and by doing so she invoked all the standards that govern qualified immunity in this Circuit, including the direct evidence rule. In any event, it is not clear that a defendant like Britton who invoked the qualified immunity defense could waive the direct evidence rule even if she wanted to do so, and plaintiff cites no case for that proposition.

Third, plaintiff argues that the appellate panel that previously reviewed this case expressly ruled that plaintiff has already provided direct evidence that satisfies this Circuit's heightened pleading standard.[7] Rightly or wrongly decided, that determination is now law of the case, plaintiff argues, and he states that he is entitled on remand to use that finding to support his argument that Britton retaliated against him for his exercise of his First Amendment rights.

Yet plaintiff reads too much into the appellate court's ruling. The appellate court did rule that plaintiff proffered direct evidence that Britton acted with unconstitutional motive with respect to his court access right, but it said nothing about the evidence that she acted with unconstitutional motive with respect to his First Amendment rights. The former is proved with evidence showing intent to deprive plaintiff of access to the courts, the latter with evidence showing intent to punish plaintiff for his

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[5] Kimberlin, 6 F.3d at 795 n.12.

[6] See Defs.' Motion to Dismiss at 14.

[7] See Crawford-El v. Britton, 951 F.2d 1314, 1319-21 (D.C. Cir. 1992). See also Kimberlin, 6 F.3d at 795 n.12.

outspokenness. In this case, different evidence supports the two allegations,[8] although some evidence can be used to support them both.[9]

Fourth, plaintiff argues that whether the appellate panel has ruled on the question or not, he has proffered evidence that shows that Britton acted with unconstitutional motive with respect to his First Amendment rights. Yet the supportive evidence that plaintiff cites is the same evidence this court considered and rejected in the February 15 order,[10] and plaintiff offers no fresh reason to revise that decision.

II.

Plaintiff's second argument on reconsideratoin seeks to support his claim that Britton's intentional and lengthy deprivation and subsequent diversion of his active legal papers violated his right to petition for redress, as guaranteed by the First Amendment. Plaintiff is correct that the February 15 order did not address this claim. The court did not understand his complaint to state a petition-for-redress claim distinct from his court access claim. Having reviewed plaintiff's clear statement of his claim in his motion for reconsideration, the court now rejects it.

Plaintiff's argument is that Britton's actions deprived him of his First Amendment right to petition for redress of grievances, and that such a deprivation is unconstitutional

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[8] Contrast Crawford-El, 844 F. Supp. at 802-03 (paragraphs 1 and 2) with Crawford-El, 951 F.2d at 1320.

[9] Compare Crawford-El, 844 F. Supp. at 803 (paragraphs 3, 4 and 5) with Crawford-El, 951 F.2d at 1319-20).

[10] See Crawford-El, 844 F. Supp. at 802-03.

unless her actions are narrowly tailored to serve a significant government interest and leave adequate alternative methods for the exercise of First Amendment rights. The problem is that although plaintiff's First Amendment rights may have been threatened, they were never actually violated. None of his cases were dismissed or otherwise harmed by the delay. See Crawford-El, 951 F.2d 1322. Although he may have suffered some peripheral harms--the cost of replacing some clothing packaged in the delayed boxes, the cost of shipping the boxes to himself, and the emotional distress he claims to have suffered--plaintiff's right to petition under the First Amendment has simply not been injured. The appellate panel in this case has suggested that even First Amendment claims are subject to a de minimus rule and that the evidence in this case does not rise to that standard. See Crawford-El, 951 F.2d at 1322. This court agrees.

Accordingly, it is hereby ORDERED that plaintiff's motion to reconsider this court's order of Febrary 15, 1994 is DENIED.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: 8-31-94

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed FEB 15, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 2/16/94]

LEONARD ROLLON CRAWFORD-EL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
PATRICIA BRITTON and	)	(RCL)
DISTRICT OF COLUMBIA,[1]	)	
	)	
	)	

[1] Even though the District of Columbia was previously dismissed as a defendant, the District is now properly named as a defendant in this case.

After the District was dismissed as a defendant on May 10, 1990 (Order of May 10, 1990, at ¶ 2), plaintiff received court-appointed counsel and moved for leave to file a third amended complaint, which named the District as a defendant. In its opposition to this motion, the District did not raise a law of the case defense to its reinstatement as a defendant, nor did it answer Crawford-El's argument that Fed. R. Civ. Proc. 15(a) allows the court to reinstate the District as a defendant. Crawford-El's motion to file a third amended complaint was granted. (Order of September 30, 1991.)

Defendants.)

MEMORANDUM OPINION

This case comes before this court on defendants' motion to dismiss plaintiff's fourth amended complaint. Having considered defendants' motion and plaintiff's opposition, this court hereby dismisses plaintiff's fourth amended complaint.

I. Background

Plaintiff Leonard Rollon Crawford-El is a District of Columbia prisoner who was transferred out of the District's prisons in 1988 and shuffled from facility to facility due to overcrowding in the District's prison system. At the start of one of those facility-to-facility transfers--a two-month-long move from the McNeil Island Correctional Center in Steilcoom, Washington on July 28, 1989, to a federal

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Similarly, when Crawford-El again named the District as a defendant in his fourth amended complaint, the District failed to oppose it on law of the case grounds (or on any other grounds, for that matter). The court granted Crawford-El's unopposed motion for leave to file a fourth amended complaint on May 5, 1992.

Again, in its motion to dismiss Crawford-El's fourth amended complaint, the District still did not raise a law of the case defense.

All in all, the District has had three chances to protest its reinstatement as a defendant in this case. If the District ever possessed a law of the case defense to reinstatement as a defendant, by now the District has thrice waived it.

correctional institution in Marianna, Florida, on September 22, 1989, via correctional facilities in Cameron, Missouri; Lorton, Virginia; and Petersburg, Virginia--Crawford-El had to surrender his property to prison officials for shipping. His property consisted of his papers in federal pro se and in forma pauperis civil actions, papers recording facts relevant to contemplated federal actions for damages, and a photograph he believed necessary for a post-conviction motion in his criminal case, as well as some clothing and other articles. (Fourth Amended Complaint, at ¶ 44.)

The District of Columbia corrections official who was responsible for shipping Crawford-El's property to him during this transfer was defendant Patricia Britton. She directed Washington state authorities to ship his property (and the property of all other prisoners who were being similarly transferred) to her in Washington, D.C. (Pl.'s Opp'n to Motion to Dismiss, at 2.) She received his property in mid-September, 1993. (Defs.' Motion to Dismiss, at 5.) Yet instead of shipping his property to him in Marianna, Britton asked Crawford-El's brother-in-law, Department of Corrections employee Jesse Carter to pick up Crawford-El's property. (Crawford-El never authorized such a release.) Carter picked up the property, but a[t] Crawford-El's request, he attempted to return it to Britton so that it could be shipped to Crawford-El through prison channels. (Fourth Amended Complaint, at ¶ 29.) Britton refused to accept the property from Carter. Carter then delivered the property to Crawford-El's mother, who mailed it to Crawford-El at his request and at his expense on January 24, 1990. (Defs.' Motion to Dismiss, at 6; Pl.' Opp'n to Motion to Dismiss, at 7.)

At first, Marianna officials would not permit Crawford-El to receive his boxes because they had been mailed to him outside prison channels. (Pl.'s Opp'n to Motion to Dismiss, at 7.) Crawford-El had to submit an administrative complaint in

order to get his property back. In February 1990, he finally did receive his property, about six months after he had surrendered his property to prison officials in Washingotn state. (Pl.'s Op'n to Motion to Dismiss, at 8.)

As a result of defendants' actions, he alleges, he had to incur the first class mail delivery costs of shipping his property from the District of Columbia to Marianna, Florida; the cost of replacing underwear, tennis shoes, soft shoes, and other items in his delayed packages; and suffered mental distress. (Fourth Amended Complaint, at ¶ 45.) For these injuries, Crawford-El seeks declaratory, injunctive, and monetary relief.

In response, defendants have filed a motion to dismiss. The issue before this court now is whether to grant this dispositive motion.

II. Court of Appeals' Decision

The United States Court of Appeals for the District of Columbia has provided direct guidance for the resolution of this motion to dismiss. In this case's first phase of life, Britton filed a motion to dismiss plaintiff's complaint,[2] which alleged that Britton had intentionally interfered with Crawford-El's constitutional right of access to the courts. On December 21, 1990, this court denied that motion to dismiss. She appealed and won a reversal and a remand to this court for repleading.

[2] The complaint then at issue was plaintiff's second amended complaint. The newly amended complaint at issue in the present case is plaintiff's fourth.

See Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 62 (1992).[3]

The Court of Appeals held that Crawford-El's complaint did not satisfy the heightened pleading standard for damages suits against government officials alleged to have acted on unconstitutional motives. To survive the motion to dismiss, Crawford-El had to satisfy the heightened pleading standard by making "specific nonconclusory allegations showing that Britton knew his property contained legal materials relating to pending cases and that she diverted his property with the intention of interfering with his litigation." Crawford-El, 951 F.2d at 1319 (emphasis in original).[4] The complaint that the Court of Appeals reviewed met this heightened pleading standard. See Crawford-El, 951 F.2d at 1320.

However, because Crawford-El did not offer evidence of actual injury, the Court of Appeals held that his complaint did not withstand the motion to dismiss. Crawford-El alleged that

[3] The District of Columbia was not a party to the appeal, although the District of Columbia Department of Corrections was a co-defendant with Britton.

[4] The Court of Appeals did not expressly state that it was requiring Crawford-El to meet the heightened pleading standard with direct, as opposed to merely circumstantial, evidence. See Crawford-El, 951 F.2d at 1317, 1320. However, the Crawford-El court could not have intended to exempt Crawford-El uniquely from the heightened pleading standard rule. See Kimberlin v. Quinlan, 6 F.3d 789, 795 n.12 (1993). For the purposes of applying the heightened pleading standard to this case on remand, this court will assume that the heightened pleading standard's direct evidence requirement as stated most recently in Kimberlin applies to this case.

the delay in receiving his property disorganized his legal proceedings, prevented him from helping his attorneys because he did not have his records and notes, and delayed his filing of several small claims, but the Court of Appeals held that these were not sufficiently concrete injuries. His only concrete injury--his allegation that the delay caused the dismissal of one of his claims--was found not to flow from Britton's acts. The Court of Appeals held that his other claimed losses--the cost of clothing to replace what as in the delayed packages, the cost of shipping his property to Florida, and the emotional distress--were not caused by a deprivation of his right of access to the courts.

The Court of Appeals remanded this case for repleading, offering Crawford-El a second chance to state an injury to support his claim of denial of acess to the courts. Crawford-El, 951 F.2d at 1322.

The question now before this court is whether Crawford-El's fourth amended complaint, pled by very able court-appointed counsel, survives defendants' motion to dismiss. Specifically, this court must determine, first, whether on remand Crawford-El has supported his court access claim--the sole claim reviewed by the Court of Appeals--with a showing of injury; and second, whether the four new claims that Crawford-El has raised in this fourth amended complaint withstand defendants' motion to dismiss.

III. Constitutional Right of Court Access

In his fourth amended complaint, Crawford-El pleads again the three injuries he alleged in the complaint the Court of Appeals reviewed. He restates his two pecuniary injuries--the cost of shipping his packages to himself, and the cost of replacing some clothing--and elaborates upon a third injury of "mental distress" caused by "the stressful communications

with officials and family members, the deprivation of pictures of loved ones, worry that his property might permanently or indefinitely be withheld from him, worry that his pending legal proceedings would be prejudiced, and worry that his pursuit of the administrative complaint in FCI Marianna [to be allowed to receive the packages as mailed from his mother] would adversely affect his relationships with FCI Marianna staff." (Fourth Amended Complaint, at ¶ 45.)

The Court of Appeals has explicitly held that these three injuries do not flow from any deprivation of Crawford-El's court access right (see Crawford-El, 951 F.2d at 1322), and that they do not support a claim seeking relief "for an isolated episode of interference with [the] rght of access to . . . legal materials." Crawford-El, 951 F.2d at 1321.

Yet instead of alleging merely a single, isolated episode of a violation of the right to court access, Crawford-El's fourth amended complaint alleges that defendants systematically deprived him and prisoners like him of their of [sic] legal materials out of pervasive ignorance or indifference to court access rights. (Pl.s' Op'n to Motion to Dismiss, at 21.) He argues that an allegation of a failure of the entire system need not be supported by a showing of actual injury. The systemic failure itself is injury enough. See, e.g., Chandler v. Baird, 926 F.2d 1057, 1063 (11th Cir. 1991); Sowell v. Vose, 941 F.2d 32, 34 (1st Cir. 1991).

To avoid the usual requirement of demonstrating actual injury, Crawford-El must allege systemic deprivation, challenging, for example, "the basic adequacy of materials and legal assistance made available to all or subgroups of the prison population. . . .[or] conditions [that] obviously go to the heart of any meaningful access to libraries, counsel, or courts." Chandler, 926 F.2d at 1063. Deprivations "of a minor

and short-lived nature" that do not "implicate general policies" are not enough. Id. at 1063.

However, Crawford-El's allegations of injury simply do not show that defendants habitually frustrated prisoners' court access rights.[5] His strongest allegation of systemic injury

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[5] It is unclear whether Crawford-El's injury allegations must meet the ordinary pleading standard or the heightened pleading standard.

The Crawford-El court, on the threshold of discussing whether plaintiff had met the injury requirement, stated that "[w]hile our past decisions have mainly focused on the need for specifics bearing on the intent element of a constitutional damage action . . . [it is] clear that the policy behind the qualified immunity defense--concern over 'the social cost of distracting government officials with litigation'--requires that the complaint as a whole satisfy the heightened pleading standard." Crawford-El, 951 F.2d at 1321 (citations omitted). The court concluded that Crawford-El had not offered "adequately specified evidence" of injury. Id.

However, the authority of the Crawford-El opinion on the heightened pleading standard has been called into question by a case that applies the heightened pleading standard only to allegations of unconstitutional intent. See Kimberlin, 6 F.3d at 795 n.12.

Nevertheless, for the purposes of this case, this debate on the scope of the heightened pleading standard is academic. Crawford-El's allegations of systemic injury would be insufficient to support his court access claim whether this court applied the ordinary pleading standard or the heightened pleading standard. Not only does Crawford-El fail to show by direct evidence that he and prisoners like him were

states that defendants have a policy of seizing prisoner property during prisoner transfers without regard for whether such property contains active legal files,[6] pursuant to which he will soon suffer another lengthy separation from his legal materials when he is returned to federal custody upon termination of this case.[7]

Yet even this allegation does not implicate a general policy that deprives prisoners from access to the courts. Most prisoners were not separated from their materials (legal or otherwise) for very long; as Crawford-El concedes, other prisoners had received their property by August or September 1989, shortly after they arrived at Lorton and only one or two months after separation from their property in Washington state. (Fourth Amended Complaint, at ¶¶ 25, 26.)

Further, although Crawford-El was separated from his materials longer than most, even that separation proved to be a minor and short-lived impediment to court access. He does not allege that he was totally deprived of legal materials. Presumably, he was able to use prison legal libraries and other legal resources while he waited for his materials to be returned to him. Further, his ability to request extensions of time from the courts handling his cases prevented the separation from his legal documents from becoming a serious impediment to his access to the courts.

His weaker allegations of systemic injury are simply off the mark. In his opposition to the motion to dismiss, Crawford-El

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systemically injured by defendants' policy, he fails to show it even by circumstantial evidence.

[6] Fourth Amended Complaint, at ¶ 52.

[7] Pl.'s Opp'n to Motion to Dismiss, at 17-18 n.11.

cites several paragraphs of his fourth amended complaint ins support of a showing of systemic injury. Yet none of them shows that he or others like him were systemically denied accesss to the courts or to legal materials. For example, three of the cited allegations show Britton's disdain for Crawford-El and her cavalier attitude toward her duties, but they do not indicate that he or other prisoners were actually deprived of materials necessary for pursuing legal matters.[8] Similarly

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[8] These three allegations are as follows:

(1) On August 9, 1989, Crawford-El and other D.C. prisoners told Britton that their property, which she was responsible for shipping, included necessary materials on pending cases. Britton smirked and acted and spoke cavalierly, but said that she understood his concerns and promised to personally make sure that he received his property. (Fourth Amended Complaint, at ¶ 20.)

(2) In Petersburg, Virginia, other D.C. prisoners told Crawford-El that Britton had called teir relatives and told them that if they did not pick up their property, she would throw it away. (Fourth Amended Complaint, at ¶ 28.) When Carter later voiced Crawford-El's concerns to Britton, she told him that Crawford-El should be happy she did not throw his property in the trash. (Fourth Amended Complaint, at ¶ 31.)

(3) Also in Petersburg, Virginia, Crawford-El and another prisoner called Britton, tricked her into accepting the call by having a friend place the call, told her that a Bureau of Prisons official had told them that their property would be sent to their final destinations, and expressed concern about their property. He alleges that Britton said that she had no duty to do anything with their property. (Fourth Amended Complaint, at ¶ 30.)

unpersuasive is his allegation that during the transfer from Cameron, Missouri, to Lorton, Britton lost a separate parcel of Crawford-El's full of non-legal documents: his canteen items, a letter with pictures, and stamps. (Fourth Amended Complaint, at ¶¶ 21-23.) That loss did not deprive him of legal materials nor limit his access to the courts. Lastly, his final cited allegation seems more supportive of defendants' position than his.[9]

Because Crawford-El has alleged no actual injury, and because he has not satisfactorily alleged systemic injury, Crawford-El's court access claim must be dismissed.

IV. New Claims

In addition to repleading his court access claim, Crawford-El invokes several other causes of action. Crawford-El alleges the violation of his First Amendment rights and his substantive and procedural due process rights. He also claims that defendants violated District of Columbia law by diverting his property outside government control to an unauthorized person. Each of these claims are examined in turn.

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[9] This last cited allegation states that in September 1989, Crawford-El asked attorney Robert Hauhart for help in retrieving his property. On behalf of Crawford-El and other prisoners, Hauhart wrote letters to Assistant Corporation Counsel (later Acting Deputy Director of the D.C. Department of Corrections) Paul Quander and to Associate Director of the Department of Corrections Arthur Graves. Quander wrote back that "[w]e are . . . moving with deliberate speed to dispatch inmates' property, including the four (4) individuals cited in your correspondence, in compliance with" Bureau of Prison directives. (Fourth Amended Complaint, at ¶¶ 32-35.)

A. First Amendment Claim

Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

In order to state a claim under the First Amendment, Crawford-El must establish first, that Britton's actions actually injured his exercise of his First Amendment rights, and second, that he has satisfied the heightened pleading standard. Crawford-El has satisfied the first requirement, but not the second.

1. Injury

As with his court access claim, the threshold determination of Crawford-El's First Amendment claim is whether he can show actual injury. In Crawford-El, the Court of Appeals suggested that plaintiffs claiming First Amendment injuries must do more than simply allege that state actors acted unconstitutionally. The Crawford-El court indicated that even in First Amendment cases, at least a de minimis showing of injury is required. See Crawford-El, 951 F.2d at 1322. The

court cited dicta in Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982), in which Judge Posner stated that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." The Bart court hypothesized that if, for example, a state official had done noting more than frown at one of his employees in mild retaliation against the employee's determination to run for public office, the frown would not trigger a First Amendment claim. See Bart, 677 F.2d at 625. The court considered it "a question of fact" whether the challenged state actions rose to a First Amendment injury. Id.

Under this standard, Crawford-El must be able to show that Britton's retaliatory acts would chill or slence a "person of ordinary firmness" from future First Amendment activities. Crawford-El can make this showing. The pecuniary losss he sustained--the cost of shipping, and of replacing clothing--may be small, but they do amount to actual harm. Tis actual injury might well deter a person of ordinary firmness from speaking or petitioning again, for fear of incurring financial injury again. Because Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

2. Heightened Pleading Standard

Nevertheless, Crawford-El's First Amendment claim must be dismissed for failure to meet the heightened pleading standard. To survive a defense of qualified immunity, a claim of a constitutional violation by a government official whcih turns onthe official's motive must meetthe heightened pleading standard established in this Circuit. See, e.g., Siegert v. Gilley, 895 F.2d 797, 800-02 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991). The heightened pleading

standard requires plaintiffs to plead "specific direct evidence of intent." Kimberlin v. Quinlan, 6 F.3d 789, 793 (1993) (emphasis in original). Plaintiffs must point to direct, not merely circumstantial, evidence of government officials' unconstitutional motives. See Seigert, 895 F. 2d at 802.

For example, in Hobson v. Wilson, 737 F.2d 1 (D.C. 1984), cert. denied, 470 U.S. 1084 (1985), plaintiffs met the heightened pleading standard by citing memoranda written by defendants (the Federal Bureau of Investigation and District of Columbia law enforcement authorities) stating that defendants were motivated by the unconstitutional desire to frustrate plaintiffs' political activities. Hobson, 737 F.2d at 10, 27.

Yet without this kind of direct evidence of unconstitutional motive, plaintiffs cannot meet the heightened pleading standard. In Kimberlin, for example, a prisoner was unable to produce direct evidence that he was placed in administrative detention three times in order to deny him access to the press and to retaliate for his claim that he had sold marijuana to Dan Quayle, then a vice-presidential candidate. The prisoner's case was backed by circumstantial evidence: discrepancies among accounts of the circumstances before the first and second detentions, hints that the official excuse for the detentions was pretextual, high-level official direction of local detention decisions, comunication between the Bush-Quayle campaign and the defendants, and the prison's sudden decision to cancel a scheduled press conference. See Kimberlin, 6 F.3d at 801-03 (Edwards, J., dissenting). Such circumstantial evidence, suspicious as it may be, did not satisfy the heightened pleading standard. Accordingly, the Kimberlin court reversed the district judge's denial of the individual defendants' motion for dismissal or summary judgment on the First Amendment claims. See Kimberlin, 6 F.3d at 798.

As these examples show, direct evidence of unconstitutional intent is very hard to plead or produce, especially without the benefit of discovery. With the best evidence of unconstitutional motive often under defendants' control, plaintiffs are rarely in a position to plead or produce enough direct evidence to meet the heightened pleading standard. See Siegert, 500 U.S. at 246 (Marshall, J., dissenting). In fact, the heightened pleading standard appears to block all cases in which the defendants do not baldly state their unconstitutional motives, since even tremendous amounts of circumstantial evidence do not suffice. See Kimberlin, 6 F.3d at 798 (Williams, J., concurring).

Crawford-El's complaint cannot clear the high hurdle of the heightened pleading standard. His complaint lacks any direct evidence that when Britton withheld and diverted his property, she was motivated by an unconstitutional desire to punish him for speaking to the press, for pursuing litigation against her or other Department of Corrections employees or the District of Columbia, or for helping other inmates file grievances.

His allegations, listed below, are entirely circumstantial:

(1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prsoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)

(2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the

correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him tosee wat he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She threatened to make life hard for him in jail any way she could. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion that prisoners like Crawford-El "don't have any rights." (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect, Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

None of these allegations offers direct evidence that Britton wasmotivated by a desire to punish Crawford-El for his exercise of his First amendment rights. At best, they show that Britton was hostile towards him generally and callous in

her regard for constitutional rights. A jury might reasonably infer from these allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker." However, reasonable inferences do not satisfy the heightened pleading standard. See Kimberlin, 6 F.3d at 798 (Williams, J., concurring). The heightened pleading standard demands direct evidenced. All Crawford-El has pled in this case is circumstantial evidence--evidence that is weaker, incidentally, than the circumstantial evidence in Kimberlin.

Accordingly, defendants' motion to dismiss Crawford-El's First Amendment claim on qualified immunity grounds shall be granted for failure to meet the heightened pleading standard.

B. Procedural Due Process Claim

Crawford-El also alleges that Britton's acts violated his Fifth Amendment right to procedural due process. (Fourth Amended Complaint, at ¶¶ 49, 52.)

For this violation, Crawford-El seeks both damages[10] and an injunction instituting hearings before prisoners are separated from their property. His proposed injunction would prevent the District, its officers, agents, and employees (i) from depriving prisoners of their legal materials without affording them a prompt informal hearing at which they may inform a responsible official of their need to retain or quickly regain possesion of legal materials needed to pursue ongoing or contemplated legal proceedings, or (ii) from separating them from materials they reasonably deem necessary to

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[10] He asks that the District be held jointly and severally liable with Britton under § 1983 for her challenged acts. (Fourth Amended Complaint, at ¶ 52.)

pursue legal redress for periods they reasonably deem likely to be prejudicial to their cases. (Fourth Amended Complaint, at ¶¶ 53(c), 44(iii).)

Crawford-El's procedural due process claim challenges two separate actions of Britton: her withholding of his property, pursuant to District policy, during his transfer from Washington state to Florida; and her diversion of his property to hsi brother-in-law. Both halves of this procedural due process claim shall be dismissed. The second half merits dismissal under the Parratt doctrine. The first half must be dismissed because prisoners' interest in possessing property and the slight added value of a pre-deprivation hearing do not outweigh prison authorities' great and legitimate need to ensure safety and efficiency in prison transfers.

1. Diversion

The procedural due process claim's second half--Crawford-El's allegation that Britton diverted his property to his brother-in-law without authority--is easily dismissed. The facts of Britton's diversion are indistinguishable from the facts of Parratt v. Taylor, 451 U.S. 527 (1981), in which the Supreme Court held that where post-deprivation remedies are "the only remedies the State could be expected to provide," post-deprivation remedies are all that are constitutionally due. Zinermon v. Burch, 494 U.S. 113, 128 (1990) (restating rule of Parratt).[11] Under such circumstances, if the state (or in this

[11] Although Parratt involved the due process clause of the Fourteenth Amendment, its analysis is equally applicable to Crawford-El's due process claim under the Fifth Amendment.

Nor does Parratt's partial reversal render the Parratt rule inapplicable to this case. Parratt was partially overruled by Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v.

case, the District of Columbia) has provided an adequate post-deprivation remedy for an alleged loss, there is no constitutional due process violation. See Parratt, 451 U.S. at 544.

In Parratt, as in this case, the government could not have provided prisoners any conceivable process before a prison official--acting randomly and without authorization--deprived a prisoner of his property. In Parratt, the Court ruled that because the state could not have anticipated the negligent loss by prison officials of a hobby kit that a prisoner had

Cannon, 474 U.S. 344 (1986), which held that merely negligent acts that cause unintended injury to property do not violate the due proces clause.

In this case, Crawford-El has not based his procedural due process claim on an allegation of mere negligence. He alleges that Britton withheld and diverted his property while "knowing, or with reckless disregard for and deliberate indifference [as] to whether" his property included legal materials in pending or contemplated cases. (Fourth Amended Complaint, ¶ 49.)

The Supreme Court has considered governmental action taken with willful, wanton and reckless disregard for and indifference to constitutional rights to be sufficient to state a procedural due process claim. Zinermon, 494 U.S. at 121. Although the Zinermon court did not address the state-of-mind issue squarely , the Court did hold that the "complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights." Zinermon, 494 U.S. at 139. See also id. at 143 (O"Connor, J., dissenting) (allegations that rights were violated "deliberately or recklessly" are sufficient).

ordered by mail, adequate post-deprivation remedies sufficed. See Hudson, 468 U.S. at 533.

This case is not materially different from Parratt or Hudson. Here, the District could not have anticipated Britton's wacky decision to divert Crawford-El's property to his brother-in-law without authorization. It is hard to imagine that it is District policy to mail prisoner property to family members instead of to the prisoners themselves, without prisoner consent. (According to defendants, Britton diverted Crawford-El's property to his brother-in-law because she misunderstood the Federal Bureau of Prisoner's policy about shipments of prisoner property. She apparently believed that the federal correctional institution in Marianna, Florida, would not accept prisoner property shipped by District officials. (Defs.' Motion to Dismiss, at 5 & n.3.)) Assuming that it is not District policy to force family members to retrieve prisoner property, Britton's action was unauthorized, unpredictable, and random (although not unique, since she is alleged to have done the sme thing with other prisoners' property). Because of that, there is no conceivable way that the District could fashion a hearing to prevent her from doing what she did.

When the District cannot reasonably anticipate due process violations, post-deprivation remedies--such as recourse to an adequate local law claim--are sufficient. In this case, an entirely adequate District of Columbia post-deprivation procedure was available to Crawford-El for the recovery of his loss. He could have brought an action for damages in the District of Columbia courts alleging that the city or it officers did negligent or intentional harm to his property.[12] The

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[12] See, e.g., Ali v. Barry, 550 A.2d 1130, 1131 n.3 (D.C. App. 1988) (District officials liable for intentional damage to property when committed within scope of employment); Scott

pleadings in this case do not reflect that he brought such an action in the District of Columbia courts.

Because the District of Columbia courts afforded him an adequate proceeding in which he could have recovered his loss, and because Britton's random and unauthorized diversion of his property could not have been prevented with a pre-deprivation hearing, this half of Crawford-El's procedural due process claim shall be dismissed.

2. Withholding

The other half of Crawford-El's procedural due process claim challenges the District's practice of withholding prisoners' possessions--including their legal materials--for lengthy perods of time during prisoner transfers. This half of the claim shall also be dismissed, but for a different reason.

Parratt does not dispose of this withholding claim as it disposed of the diversion claim. Instead of challenging one random and unauthorized act, Crawford-El's withholding claim alleges a general failure to provide procedural safeguards to prevent foreseeable, avoidable harms authorized by the District. Crawford-El alleges (and the District does not dispute) that when he was transferred, there was a foreseeable risk that he would be separated from his legal materials while one of his cases was pending or contemplated. He also alleges that this risk could have been avoided by a pre-deprivation hearing, and that when Britton withheld his property, she was

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v. District of Columbia, 493 A. 2d 319, 322 (D.C. App. 1985) (District liable for its employees' intentional torts when committed within scope of employment). See also 24 D.C.C. § 442 ("Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction and discipline of all persons comitted to such institutions.").

exercising power delegated to her from the District to do so.[13] In such a case, the mere existence of adequate post-deprivation remedies is not sufficient to dimiss the claim. See Zinermon, 494 U.S. at 136, 136-38 (permitting procedural due process claim to go forward, despite existence of adequate state remedies, where deprivation was aleged to have been predictable, avoidable through pre-deprivation procedures, and authorized).

Since the withholding claim cannot be easily dismissed under Parratt, the task bcomes determining whether any process is due, and how much. procedural due process "is a flexible concept that varies with the particular situation." Zinermon, 113 U.S. at 127. The particularized inquiry of determining how much process is due in a given situation is governed by three factors:

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[13] According to Crawford-El's unchallenged allegations, Britton's withholding of his property during his transfer occurred because of "the District of Columbia's alleged custom, policy and practice of seizing active legal files for indefinite periods." (Pl.'s Opp'n to Motion to Dismiss, at 20.) "At no time during this litigation has anyone suggested that Ms. Britton's mass seizure of prisoner property was unusual or in any way in violation of District policy." (Pl.'s Opp'n to Motion to Dismiss, at 15, n.8.) Crawford-El expects that his "discovery requests will show that the District of Columbia routinely deprives prisoners of their property, including legal papers, for substantial periods of time, incident to movement to distant facilities, or from one District facility to another, and even from cell to cell." (Pl.'s Opp'n to Motion to Dismiss, at 15 n.8.) He asserts that "[u]nder current District policy, Mr. Crawford-El has no right to retain possession of active legal files during travel to his final federal destination." (Pl.'s Opp'n to Motion to Dismiss, at 17 n.11.)

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and adminsitrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). A weighing of the three factors in this case shows that the District's interest in securing a safe and efficient system of prisoner transfers far outweighs prisoners' interest in possesing their property, given the very slight added value that a pre-deprivation hearing would provide.

Prisoners like Crawford-El, of course, have an interest in their possession, and in some possessions they have a stronger interest thatn others. They have an especially hight interest in their legal materals that are necessary to pursue pending or contemplated litigation. To deprive prisoners of legal materials entirely might frustrate their ability to pursue litigation, jeopardizing their constitutional right to court access. It would be just as unconstitutional as unjustifiedly requiring Jewish inmates to surrender every yarmulke or other head covering during transfers, frustrating the "First Amendment right to fulfill one of the traditional obligations of a male Orthodox Jew--to cover his head before an omnipresent God."[14] By contrast, prisoners have a much lesser interest in their possession that have nothing to do with the exercise of constitutional rights. Crawford-El may have a strong interest in possessing his legal materials, but he has a

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[14] Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting).

far weaker interest in possessing the underwear and tennis shoes that were packaged in his shipped boxes.

The second prong of the Mathews analysis requires examining the degree to which a pre-withholding hearing would prevent wrongful deprivations of prisoner property. A pre-withhlding hearing would not add much to the redress already availabl to prisoners like Crawford-El. He is already free to alert the courts for an extension of time until the legal materials were returned, or if necessary, he can move for an injunction ordering the District to return necessary legal materials. Such measures minimize, if not eradicate, any risk that his court access rights would actually be injured when the District withholds his legal materials.

Thirdly, the Mathews analysis requires weighing the District's need for efficiency and security in prisoner transfers. The District has a great interest in ensuring safe and efficient prisoner transfers by transferring prisoners's property separately form the prisoners themselves.

In sum, the Constitution does not require burdening the Distict with expensive pre-withholding hearings which would not add much to the relief prisoners already have available. Crawford-El's strong interest in possessing his legal materials is already sufficiently safeguarded by his ability to appeal to the courts handling his jeopardized cases; his negligible interest in his sneakers deserves no additional procedural safeguards.

Because the District's interests outweigh the prisoners' interest and the risk of error in this Mathews balancing test, no pre-deprivation hearing is constitutionally required before the District withholds property from prisoners. because the District's failure to provide such a pre-withholding hearing dies not amount to a constitutional violation, this half of

Crawford-El's procedural due process claim shall be dismissed.

C. Substantive Due Process Claim

Crawford-El also alleges that Britton's withholding and diversion of his property violated his Fifth Amendment substantive due process "protect[ing] property possession."[15] The due process clause of the Fifth Amendment, howerver, affords property only procedural protection, forbidding the District of Columbia form depriving any person of property without due process of lw. There is no absolute, substantive right not to be alienated from one's property. See, E.g., Gilles, 676 F. Supp. at 344 (Fifth Amendment's due process clause "protects against deprivation of property without due process of law") (emphasis in original). Cf. Parratt, 451 U.S. at 537 ("Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'") (citations omitted). Crawford-El received due process before being deprived of his property (see supra (IV (B)), and he is entitled to nothing more under the Fifth Amendment. Accordingly, his substantive due process claim shall be dismissed.

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[15] Pl.'s Opp'n to Motion to Dismiss, at 22-23; Fourth Amended Complaint, at ¶ 49.

The complaint that the Court of Appeals reviewed in this case also alleged a violation of Fifth Amendment due process rights, but the Court of Appeals found this claim "substantively indistinguishable from the access to courts claim" and declined to address it separately. Crawford-El, 951 F.2d at 1316 n.1.

D. Common Law Claim of Conversion

Lastly, Crawford-El claims that Britton's diversion of his property outside government control to an unauthorized person constitutes conversion, and that the District of Columbia is jointly and severally liable for her act of conversion under the doctrine of respondeat superior. (Fourth Amended Complaint, at ¶¶ 46, 47.) See Fotos v. Firemen's Ins. Col, 533 A.2d 1264, 1267 (D.C. App. 1987).

Without considering the merits of this contention, this court must dismiss the claim for lack of jurisdiction. All of Crawford-El's feeral claims are being dismissed, and a District law tail should not be allowed to wag the federal dog. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

V. Conclusion

Although defendants have prevailed on their motion to dismiss, theis court expresses appreciation to Crawford-El's court-appointed counsel, Daniel M. Schember, who handled this case since Britton's notice of appeal in an exemplary fashion. His pleadintgs before this court were well0researched and well-argued. He has performed in the highest traditions of the District of Columbia Bar.

All of Crawford-El's federal claims are dismissed, both as against Britton and as against the District of Columbia.[16]

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[16] Crawford-El has brought his federal claims against both Britton and the District. He alleges that her decision to withhold and divert his property executes an unconstitutional District policy or custom, rendering the District liable for her acts. See, e.g., Monell v. Department of Social Services, 436 U.S. 658, 690-94 (1978); Pembaur v. Cincinnati, 475 U.S. 469, 477-484 (1986).

However, there is no need to decide this question because all of Crawford-El's constitutional claims fail aginst Britton herself. Because Crawford-El has not shown that Britton comitted any constitutional violations, the District cannot be held liable for her acts.

Crawford-El's common law claim is also dismissed for lack of jurisdiction. A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

DATE: 2-14-94

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed FEB 15, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 2/16/94]

LEONARD ROLLON CRAWFORD-EL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
PATRICIA BRITTON and	)	(RCL)
DISTRICT OF COLUMBIA,	)	
	)	
Defendants.	)	

ORDER

This case comes before this court on defendants' motion to dismiss plaintiff's fourth amended complaint. Having considered defendants' motion and plaintiff's opposition, defendants' motion is hereby GRANTED for the reasons set forth in an accompanying memorandum opinion. The court hereby dismisses the federal claims of plaintiff's fourth amended complaint, both as against defendant Patricia Britton and as against the District of Columbia. Crawford-El's District of Columbia law claim is also dismissed for lack of jurisdiction.

Royce C. Lamberth
United States District Judge

DATE: 2-14-94

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 5, 1992

Mr. Daniel M. Schember
1666 Connecticut Avenue, NW
Suite 225
Washington, D.C. 20009

Re: Leonard R. Crawford-El
v. Patricia Britton
No. 91-1836

Dear Mr. Schember:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1991, Decided December 27, 1991

No. 91-7023

LEONARD ROLLON CRAWFORD-EL,
Appellee

v.

PATRICIA BRITTON AND DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS,
Appellants

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 89-03076)

Edward E. Schwab, Assistant Corporation Counsel, Office of the Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles Reischel*, Deputy Corporation Counsel, Office of the Corporation Counsel, were on the brief, for appellants. *Lutz Alexander Prager*, Attorney, Office of the Corporation Counsel, also entered an appearance for appellants.

Daniel M. Schember for appellee.

Before: BUCKLEY and WILLIAMS, *Circuit Judges*, and Alan D. Lourie,* *Circuit Judge*, U.S. Court of Appeals for the Federal Circuit.

Opinion for the Court filed by *Circuit Judge* Williams.

WILLIAMS, *Circuit Judge*: Because of overcrowding in the District of Columbia prison system, plaintiff Leonard Rollon Crawford-El was shuffled about between its Lorton, Virginia facility and several other places of custody. He was first transferred in December 1988 to the Spokane County Jail in the state of Washington, then in the late summer and early fall of 1989 back to Lorton, and ultimately to a federal prison in Marianna, Florida, where he arrived in September 1989. Defendant Patricia Britton, a District of Columbia corrections officer, had charge of arranging his journeys. At the time, he owned three boxes containing clothes and papers relating to several pending lawsuits. At some point (by his account in August or September 1989, by hers in October 1989), Britton delivered the boxes to Crawford-El's brother-in-law, Jesse Carter, rather than simply shipping them to him at the next destination. Some time later Crawford-El's mother secured the boxes and shipped them to him in Florida, where they reached him in February 1990.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Crawford-El sued Britton for damages under 42 U.S.C. § 1983, claiming that her misdelivery of his legal papers to Carter was an intentional interference with his constitutional right of access to the courts. In support he alleged (among other things) various prior conversations between himself and Britton that suggested both her awareness that the boxes contained active legal files and her wish to do him harm. (We review the details below.)

In his brief here Crawford-El also argues that Britton retaliated against him for exercising his First Amendment rights. See Appellee's Brief at 14-19. The complaint makes no reference to this First Amendment claim, however, and the district court quite reasonably did not understand it as raising such a claim, see *Crawford-El v. Britton*, No. 89-3076, Order at 1, Joint Appendix ("J.A.") at 8[1] so we do not consider it here. See *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984).

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[1]The district court did read the complaint as claiming a violation of Crawford-El's due process rights under the Fifth Amendment. *Id.* This appears to be substantively indistinguishable from the access to courts claim, which courts have traced to several constitutional provisions, including the First Amendment, the due process clause, and the privileges and immunities clause. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983). The parties have not addressed any arguments here to a distinct due process claim, and we do not consider it.

Britton moved for dismissal of the complaint and for summary judgment. She asserted a qualified immunity defense under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), arguing that the plaintiff's claims do not make out a violation of any constitutional right "clearly established" at the time of her acts, *id.* at 818. She also argued that the plaintiff had failed to satisfy the "heightened pleading standard" that this circuit applies to damage actions against government officials. The district court denied the motion, *Crawford-El v. Britton*, No. 89-3076, Order (D.D.C. Dec. 21, 1990), and she appeals.

We hold that the complaint has not satisfied our heightened pleading standard, but remand the case to the district court for repleading and reconsideration in light of our opinion.

I.

Our jurisdiction is limited to whether at this stage Crawford-El's claim withstands the qualified immunity defense and satisfies the heightened pleading standard. A district court's rejection of a qualified immunity defense is immediately appealable under the "collateral order" exception to 28 U.S.C. § 1291's requirement of finality, to the extent it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). Otherwise trial court error could defeat much of the defense's purpose -- to protect officials not only from liability but also from undue burdens of litigation. To determine the relevant facts, we look not only to the pleadings but to the entire record on appeal, viewed, as under Fed. R. Civ. P. 56, in the light most favorable to the party opposing summary judgment (except for the heightened pleading requirement discussed below). See, e.g., *Elliott v. Thomas*, 937 F.2d 338, 341-42 (7th Cir. 1991); *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988).

We do not apply the summary judgment model pure and simple, however, as the plaintiff has not yet secured discovery. *Harlow*, 457 U.S. at 818 (discovery should not be allowed until qualified immunity issue is resolved). Our heightened pleading requirement insists that, before discovery, plaintiffs suing government officers for damages set forth "'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.'" *Andrews v. Wilkins*, 934 F.2d 1267, 1269-70 (D.C. Cir. 1991) (quoting *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984)). Because application of the heightened pleading standard precedes discovery, the assumptions of ordinary summary judgment are (as we shall see) not fully applicable.

We note that some of Britton's arguments on appeal take the form of a simple denial -- an "I didn't do it" defense. Immediate review of the district court's treatment of those issues is beyond the scope of *Mitchell's* exception, which exists to supply early review of the *law* "clearly established" at the relevant time. See, e.g., *Elliott v. Thomas*, 937 F.2d at 341-42; *Kaminsky v. Rosenblum*, 929 F.2d 922, 925-26 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

II.

To determine whether Britton's qualified immunity defense prevails, we first consider what state of mind must have accompanied her misdelivery of Crawford-El's legal papers to render that action a constitutional tort (or, more precisely, what state of mind would a reasonable officer at the time of the alleged misdelivery have thought rendered it

unconstitutional).[2] Although a purpose of the reasonable-officer standard is to enable a court to decide on qualified immunity without intrusive discovery, *Harlow*, 457 U.S. at 815-19, we have understood *Harlow* to allow inquiry into motive where a bad one could transform an official's otherwise reasonable conduct into a constitutional tort. See *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991); *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1431 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 185-87 (D.C. Cir. 1986); *Hobson v. Wilson*, 737 F.2d at 29-31; compare *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 1017 (D.C. Cir. 1991) (no state of mind could make the specified conduct unconstitutional).

Well before defendant's activities in 1989 the Supreme Court decided that prisoners have a general right of access to law libraries or legal assistance. See *Bounds v. Smith*, 430 U.S. 817, 821-25 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). But it doesn't follow that any interruption in Crawford-El's access to his papers was unconstitutional. Prison officials have considerable discretion to implement policies for the administration of correctional facilities and are free to formulate rules (including regulation of inmates' property) that impinge on fundamental rights so long as they are " 'reasonably related' to legitimate penological objectives". *Turner v. Safley*, 482 U.S. 78, 87 (1987). At a minimum, if

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[2] Crawford-El associates the misdelivery with his transfer from Lorton to another prison in Petersburg, Virginia on the way to Florida in August or September 1989, whereas Britton states she delivered the boxes to Carter on October 5, 1989. See Affidavit of Patricia Britton at 3 (Mar. 26, 1990), J.A. at 55. We are aware of no cases between August and October 1989 that would change our analysis.

Britton's delivery of the boxes to Carter was a reasonable means of securing their safe transfer, it would not violate his *Bounds* right.[3]

Plaintiff argues that any "unreasonable" (by which he appears to mean "negligent") withholding or misdelivery of property would violate the *Bounds* right if the parcel contains active legal files. He suggests that prison officials in Britton's position are aware that many prisoners have active legal papers, so that there should be no need to offer specific evidence of awareness of a parcel's contents. Appellee's Brief at 19-20 n.8.

Though Britton's position is more obscure, she implicitly and correctly recognizes that it was clear by 1989 that an officer who interfered with the transmission of an inmate's legal papers for the purpose of thwarting the inmate's litigation violated his constitutional right of access to the courts. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986); *Carter v. Hutto*, 781 F.2d 1028, 1031-32 (4th Cir. 1986); *Tyler v. "Ron" Deputy Sheriff*, 574 F.2d 427, 429 (8th Cir. 1978); cf. *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1986) (allegation that prison officials deliberately held up inmate's mailing of *in forma pauperis* petition stated claim for constitutional violation); *Washington v. James*, 782 F.2d 1134, 1138-39 (2d Cir. 1986) (interference with legal

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[3] At worst, the act might constitute a common law conversion, *Fotos v. Firemen's Ins. Co.* 533 A.2d 1264, 1267 (D.C. 1987), but that is a separate question that has no direct bearing on whether the act violated Crawford-El's *Bounds* right. We reject his contention to the contrary. See Appellee's Brief at 22.

mail states claim for violation of right of access).[4] Under this specific intent standard, Britton's act would constitute a violation of Crawford-El's *Bounds* right only if she knew his property contained legal papers relevant to pending litigation *and* she diverted the property with the purpose of interfering with his litigation, or at least with deliberate indifference to such interference. (Hereafter we use "intent to interfere" as encompassing deliberate indifference.)

It cannot, however, be said that anything like Crawford-El's proposed negligence standard was clearly established in 1989 (or now, for that matter). Perhaps the broadest ruling is *Jackson v. Procunier*, which held a *Bounds* claim would be shown if "mail officers *deliberately* held up [the plaintiff's] mail when they *should reasonably have known* that the delay would deprive him of his right of access to the courts". 789 F.2d at 311 (emphasis added). The delayed envelope stated that it contained legal materials that had to be in court by a specific date one week later, *id.* at 308, and the resulting delay cost the prisoner dismissal of his appeal. Thus, the court was presumably holding that it was enough to allege knowing delay of legal papers, with awareness of some (at least nontrivial) *likelihood* that the delay would defeat the inmate's claim. The other cases appear similarly to require either an intent to thwart the prisoner's access to courts, or at a minimum deliberate or reckless indifference to a foreseeable disruptive effect. See, e.g., *Simmons v. Dickhaut* 804 F.2d at

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[4] Our circuit has not spoken to this issue. However, the unanimity among those circuits that have done so, together with the fact that "[i]t follows logically [from *Bounds*] that the allegation of intentional violation of the right of access to the courts states a cause of action under § 1983", *Simmons v. Dickhaut*, 804 F.2d at 183, suggests that a reasonable official would know that intentional deprivation of the *Bounds* right violates the Constitution.

184 (inmate claimed prison officials withheld legal material from property returned to him, although he three times requested and identified it); *Carter v. Hutto*, 781 F.2d at 1031-32 (inmate claimed that prison officials deliberately seized and destroyed handwritten notes of his trial, the basis of his habeas claim); *Patterson v. Mintzes*, 717 F.2d 284, 288-89 (6th Cir. 1983) (inmate denied access to his transcripts and legal papers necessary for court appearance despite several specific requests identifying his critical dependence on the documents). Thus, while the cases "clearly establish" that Crawford-El had a constitutional right against any official who interfered with his access to active legal files with intent to impair that access, they do not establish the broader right that he claims.

Quite apart from the issue of qualified immunity, we doubt if an act such as Britton's could violate the *Bounds* right unless done with an intent to interfere with litigation (or, to repeat, with deliberate indifference to such interference). If it could, a prisoner could easily transform almost any negligent delay in the transfer of his property (which would not otherwise violate the Constitution, see *Daniels v. Williams*, 474 U.S. 327, 336 (1986) into a constitutional tort if the property contained active litigation papers. Defendant's theory, that officials are generally aware that prisoners are frequently engaged in litigation and should be liable for any negligent delay, could extend (for example) to any mail carrier handling prison mail and negligently delaying its delivery.

Accordingly, to withstand Britton's motion to dismiss, Crawford-El must have made specific nonconclusory allegations showing that Britton knew his property contained legal materials relating to pending cases *and* that she diverted his property with the intention of interfering with his litigation.

On the first point, Crawford-El claims to have informed Britton that his boxes contained legal papers:

> On Friday August 18, 1989, I spoke to defendant Patricia Britton at the Western Missouri Correctional Center [while en route from Washington State back to Lorton]. D.C. offenders Danny Phillips and James Neal and I were talking to Britton and each informed her that our legal material pertaining to current cases was in our property and was necessary in order for us to seek redress from the courts.

Affidavit of Leonard Crawford-El at 1 (May 3, 1990), J.A. at 73; see also Complaint at 2, J.A. at 28.

Crawford-El also alleges specific facts suggesting an intention to interfere with his pursuit of his legal claims. *First*, he has provided evidence of Britton's general hostility to him. He alleges[5] that after he was quoted by reporters in an April 20, 1986 *Washington Post* article criticizing conditions at Lorton, Britton rebuked him for cooperating with the reporters and "told plaintiff that so long as he was incarcerated she was going to do everything she had to make it as hard for him as possible as a result of his having met and spoke [sic] with the reporters and for allegedly embarassing [sic] her before her coworkers thru the article." Amended Complaint at 2 (Sept. 6, 1990), J.A. at 16.

Crawford-El also states that after his transfer to Spokane he was quoted several times in a December 17, 1989 [sic; presumably *1988*] *Washington Post* article about the

[5] The facts are described below according to Crawford-El's allegations and offers of proof; for the purposes of this appeal we do not have jurisdiction to consider Britton's denials of certain allegations, for the reasons set forth in Part I.

transfer, and thereafter "was locked down and officials there informed him that Defendant Britton had told them Plaintiff was a 'Troublemaker'." *Id.* This adds only a very little; we suspect that even prison officials free of hostility toward Crawford-El might regard "troublemaker" as an apt moniker.

Crawford-El's final claim of general hostility is that he learned (from an unidentified source) that Britton, after conveying his property to Carter, had told Carter that Crawford-El "should be happy she did not throw it in the trash." Complaint at 3, J.A. at 29. This contention is undermined by Crawford-El's acknowledgment of Carter's statement that Britton, when asking him to pick up the property, had told him she was afraid it might otherwise be lost. *Id.*

Two of these assertions appear to be pure hearsay -- Crawford-El's statements that "officials" at Spokane told him that Britton told them Crawford-El was a "troublemaker" and that someone (Carter?) told him that Britton had said Crawford-El was lucky she did not throw his property in the trash. Normally such hearsay would not be enough to raise an issue of fact for summary judgment purposes. See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); see also 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2738, at 470-74 (2d ed. 1983). Britton may have waived the objection, see *id.* at 507-09; *In re Teltronics Services, Inc.*, 762 F.2d 185, 1192 (2d Cir. 1985), but the more important point is that there has been no opportunity for discovery. Accordingly, the heightened pleading requirement demands only that plaintiff "relate[e] the pertinent information that is already in his possession." *Hunter v. District of Columbia*,

943 F.2d 69, 76 (D.C. Cir. 1991). Inadmissible hearsay reports of the defendant's *specific* statements indicating malicious intent can satisfy that standard. Counsel involved in the drafting of such reports will doubtless be alert to the possible Rule11 hazards.

Second, Crawford-El bolsters the impact of Britton's statements with a claim of disparate treatment: He alleges that he and other prisoners who had complained about being videotaped during the transfer were not sent their property, whereas others being transferred were sent theirs. See Affidavit of Leonard Crawford-El at 4-5, J.A. at 76-77 (asserting that D.C. inmates who filed notices of intent to sue over the videotaping and/or were named as plaintiffs in the lawsuit over the videotaping, "experienced the same intentional deprivations as plaintiff at the hands of Britton who is also a defendant" in that case, whereas "D.C. offender John McNeil and others [being transferred from Washington State] property was [sic] in R + D in Lorton and given to them"); see also Attachments to Appellee's Brief at 1-14, J.A. at 82-87 (copy of complaint in *Alton Best v. District of Columbia*, lawsuit over videotaping); Attachments to Appellee's Brief at 38-45 (notices of intent to sue by Crawford-El, James Neal, Danny Phillips, and Kenneth Ward).

Third, Crawford-El states that prison authorities would not permit him to receive property mailed outside prison channels, even by a family member. Complaint at 4, J.A. at 30. Thus, when his mother finally mailed him his property, he was initially denied access to the materials and secured them only by filing an administrative complaint with the Marianna, Florida warden. Amended Complaint at 3, J.A. at 17. If Britton was aware of the practice, this would supply a reason why she could have believed that delivery to Carter might thwart Crawford-El's litigation efforts.

Taking Crawford-El's allegations and supporting evidence of unconstitutional motive as a whole, we find them "specific and concrete enough to enable [Britton] to prepare a response, and . . . a motion for summary judgment based on qualified immunity." *Whitacre v. Davey*, 890 F.2d at 1171. The allegations in *Martin v. D.C. Metropolitan Police Department*, which we rejected, 812 F.2d at 1435, were by comparison quite vague. The plaintiff claimed that he had been arrested for burglary in retaliation for a civil lawsuit that he pressed against certain officers who had beaten him with nightsticks in an episode captured on videotape and broadcast on the local news. His arrest was by *other* police officers, and against them plaintiff could only claim that they had reviewed the videotape of the beating; that he was the only person identified and prosecuted as a result; that defendants worked closely with the prosecutor on the case; and that an unusually large number of officers arrested him. *Id.* Here Crawford-El has identified specific statements by Britton to him and others showing awareness that his boxes contained litigation papers and that she was hostile; and he has identified specific persons also involved in documented legal conflict with Britton and (according to him) subjected to adverse treatment of their property, in contrast with others. For summary judgment purposes Britton should be able to meet these assertions with specific affidavits.

Although Crawford-El has adequately specified evidence of Britton's intent, he has offered none showing that Britton's actions actually deprived him of his right of access to courts. While our past decisions have mainly focused on the need for specifics bearing on the intent element of a constitutional damage action, *Hunter v. District of Columbia* makes clear that the policy behind the qualified immunity defense -- concern over "the social cost of distracting government officials with litigation", 943 F.2d at 75 --

requires that the complaint as a whole satisfy the heightened pleading standard.

Some of Crawford-El's damage allegations relate to impacts on his litigation -- assertions that the delay "made it impossible for him to proceed in an organized manner," Amended Complaint at 4, J.A. at 18, that he was "prevented from assisting his attorneys . . . in that he was not able to refer to his records and notes", *id.*, that his "filing of several small claims in D.C. was delayed unnecessarily", *id.*, and that the defendant's acts "were the proximal [sic] cause of the dismissal of one pro se case [with a specific title]". Except for the one reference to dismissal of a case, unsupported by any detail, none of these shows actual deprivation of access to the courts.

We agree with those circuits holding that where a plaintiff seeks relief for an isolated episode of interference with his right of access to a law library, legal materials, or legal assistance, he must allege an actual injury to his litigation. Thus, in *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir. 1991), the court held that actual prejudice was necessary where the "alleged deprivations are of a minor and short-lived nature and do not implicate general policies." See also *Sowell v. Vose*, 941 F.2d 32, 35 (1st Cir. 1991) (drawing a similar line, and noting that the only injury from certain delays was plaintiff's need to seek extensions of filing deadlines); *Sands v. Lewis* 886 F.2d 1166, 1169-71 (9th Cir. 1989) (drawing distinction between an "absolute" deprivation of access to legal materials and a "conditional restriction", for which actual injury must be shown); *Peterkin v. Jeffes*, 855 F.2d 1021, 1039-42 (3d Cir. 1988); *Hossman v. Spradlin*, 812 F.2d 1019, 1022 (7th Cir. 1987); *Holloway v. Dobbs*, 715 F.2d 390, 392 (8th Cir. 1983); cf. *Washington v. James*, 782 F.2d at 1140-41 (Cardamone, J., dissenting) (rejecting majority's view that complaint alleged *regular* interference

with plaintiff's legal correspondence, dissenter would have dismissed the claim for want of "*actual denial* of access to federal courts") (emphasis in original); *Mann v. Smith*, 796 F.2d 79, 83-84 & n.5 (5th Cir. 1986) (requiring actual injury where alleged violation took form of inadequate " 'checkout' system for law books"). This requirement flows from the general principle that some showing of injury is a prerequisite to a constitutional tort action. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (1978) ("the decision in *Bivens* [the federal analog of § 1983] established that a citizen *suffering a compensable injury* to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official") (emphasis added); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("even in the field of constitutional torts *de minimis non curat lex*. . . . A tort to be actionable requires injury.").

The only concrete (legal) injury cited by Crawford-El is the dismissal of one *pro se* action filed in the federal district court in Maryland. See Complaint at 4, J.A. at 18; Opposition to Defendant's Motion for Reconsideration at 6 (May 21, 1990), J.A. at 99. But that action was dismissed on May 4, 1990, well after Crawford-El recovered his legal materials in early February 1990; indeed, the district judge had extended the deadlines for discovery and summary judgment motions to March 27, 1990, and April 26, 1990, respectively. See J.A. at 109-10. Thus, like the plaintiff in *Sowell v. Vose* who secured extensions to accommodate access delays wrongly inflicted upon him, Crawford-El has failed to link his deprivation to any adverse litigation effect.

Crawford-El has also alleged losses completely peripheral to his litigation -- the cost of underwear and shoes during the eight months he was denied access to the clothes in his property; the cost of mailing the boxes from the District to the Florida facility; and emotional distress. See Amended Complaint at 4, J.A. at 18. These do not help show a violation of the *Bounds* right; the character of that right defines the injury requirement. If there is no denial of access to the courts, the presence of legal records in the diverted boxes cannot turn a garden-variety property deprivation into a *Bounds* claim.

III.

Although we hold that Crawford-El's complaint does not satisfy our heightened pleading standard, we remand the case to the district court for repleading. On remand Crawford-El should be permitted to add, if he can, nonconclusory allegations that would show the actual injury necessary to support his *Bounds* claim. Since the proceedings in district court, our *Hunter* decision has made clear the scope of the heightened pleading requirement; as plaintiff prevailed in district court and his pleadings were *pro se*, the case for a remand to comply with those requirements is more compelling than in *Hunter* itself. Permission to file additional amendments to the complaint, such as to raise plaintiff's new First Amendment theory, lies in the sound discretion of the district court. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). We note, however, that even First Amendment claims appear to be subject to a *de minimis* rule. See *Bart v. Telford*, 677 F.2d at 625.

Reversed and remanded.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed May 10, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
	)	
Defendant.	)	

ORDER

1. Defendant Patricia Britton's motion to dismiss is DENIED.

2. The District of Columbia is substituted for the District of Columbia Department of Corrections as defendant. Defendant District of Columbia's motion to dismiss is GRANTED.

3. Defendant Britton shall respond to plaintiff's outstanding discovery requests by May 17, 1990.

4. The District of Columbia shall treat plaintiff's outstanding discovery requests as having been served on it as a non-party and shall respond to the requests by May 17, 1990.

5. Defendant Britton shall file any written discovery requests by May 24, 1990.

6. A further status conference shall be held May 25, 1990 at 9:30 a.m.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: May 10, 1990

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed August 31, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This case comes before the court on defendant Patricia Britton's motion for reconsideration of the court's order of May 10, 1990, denying defendant Britton's motion to dismiss, and the opposition thereto.[1] As grounds for her motion, Britton cites the case of Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990). Because the court did not consider

[1] The District of Columbia, which is no longer a party to this action having been dismissed by the court on May 10, 1990, unsuccessfully attempts to join in defendant Britton's motion.

Siegert when it ruled on defendant's motion to dismiss, it will grant the motion to reconsider.

Plaintiff is a prisoner who claims that defendant deprived him of his legal materials with the intent of interfering with his access to the courts in violation of the Sixth Amendment and in violation of his due process rights under the Fifth Amendment.

Plaintiff was transferred from the Maximum Security Facility at Lorton, Virginia to the Washington State inlate 1988. After being transferred within facilities within Washington State, plaintiff was informed on July 28, 1989 that he would be returning to Lorton. Instead of being shipped back to Lorton, however, plaintiff was sent to the Western Missouri Correctional Center in Cameron, Missouri on August 9, 1989. Plaintiff's property, including his legal papers from on-going court cases, was not sent to Missouri because plaintiff was only expected to be there a week. When he arrived at Lorton on August 19, 1989, his propety did not arrive despite plaintiff's numerous inquiries to defendant Britton and to the Director of the D.C. Department of Corrections before his journey, and after his arrival. On September 7, 1989, plaintiff was transferred from Lorton to the Federal Bureau of Prisons at Petersburg, Virginia, without first receiving his legal material. While at Petersburg, plaintiff learned that Ms. Britton had contacted his brother-in-law without plaintiff's permission, and arranged for plaintiff's brother-in-law to receive plaintiff's property. Plaintiff finally received his material in February 1990, eight months after being separated from it by defendants.

The Court of Appeals for this Circuit explored the doctrine of qualified immunity and how it applies to cases which necessarily call into question the subjective intent of the government official.

> [W]hen the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of the plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of the defendant's alleged unconstitutional purpose.

Id. at 801, citing Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425, 1433 (D.C. Cir. 1987). The court went on to examine the standard of pleading required of plaintiffs in cases involving such allegations. After examining the case law and the general purposes of qualified immunity doctrine, the Court of Appeals concluded that "in order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." Siegert 895 F.2d at 802.

Plaintiff, who is representing himself pro se, argues that Ms. Britton had knowledge that the deprivation of his legal papers violated his constitutional rights because plaintiff had informed her so. Therefore he concludes that her failure to insure that his papers were immediately forwarded to him constituted a willful and intentional deprivation of constitutional rights. This sort of proof seems to border on circumstantial, the reliance upon which Siegert forbids. During the course of hearings on the motion to dismiss and the motion to reconsider, however, plaintiff has related to the court direct evidence of defendant Britton's intent. Plaintiff described an incident which took place in 1986 in which defendant Britton told plaintiff that he was a "troublemaker" because he had complained to Washington Post reporters about conditions at Lorton. Plaintiff claims that Britton promised to make his incarceration as hard as possible as a result of his having talked with the reporters. Plaintiff has

submitted certified copies of the newspaper articles in which he was quoted. Plaintiff has referred to the threat of Ms. Britton in his opposition to the motion for reconsideration, but there is no description or reference to the incident in either the complaint or in plaintiff's affidavit attached to the complaint.

Because the plaintiff is a pro se prisoner who is without the advantages of legal training that might assist him in making out a more complete complaint, this court will allow plaintiff an opportunity to amend his complaint to add reference to the incident which took place in 1986 which supports plaintiff's claim that Ms. Britton's intent was to deprive him of his constitutional rights, and that the mishandling of his legal papers was not bureaucratic error.

During the course of hearings on the motion to dismiss and the motion to reconsider, plaintiff has also made reference to unfavorable decisions made in his other cases pending in other courts as a result of his inability to respond without his legal materials. In order to clarify this for the court and for the defendant, the court asks that plaintiff specify in his amended complaint exactly what harm has befallen him as a result of the deprivation of his legal documents, as well as any other harm that occurred because of the handling of his property.

Upon consideration of the above analysis, and for the reasons stated in open court on May 10, 1990, plaintiff shall be allowed to amend his complaint to comply with Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990), and to allege his direct evidence of defendant Britton's unconstitutional intent. Therefore, it hereby is ORDERED that:

1. Defendant Britton's motion for reconsideration is GRANTED.

2. Plaintiff shall have 20 days in which to amend his complaint and allege direct evidence of defendant Britton's unconstitutional intent or the court will dismiss this action based on defendant Britton's qualified immunity.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Aug. 31, 1990

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed December 21, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter came before the court for a status conference on November 28, 1990.

Plaintiff, who is currently proceeding pro se, was present, as was Assistant Corporation Counsel Kenneth Marty, appearing on behalf of defendant Patricia Britton.

Plaintiff complied with this court's order of August 31, 1990, and filed an amended complaint with allegations of direct evidence of defendant Britton's unconstitutional intent,

and with specifications of how plaintiff has been harmed as a result of defendant's actions.

Defendant Britton filed an answer to the amended complaint on November 20, 1990.

At the status conference, defendant's counsel indicated that defendant continues to urge the court to dismiss the amended complaint, for the same reasons originally argued, i.e., that the complaint as amended still fails to state a claim upon which relief may be granted or over which this court has jurisdiction, and that defendant is entitled to official immunity. The court deemed these comments to be an oral motion to dismiss, on the same grounds as originally presented by defendant. Defendant's motion to dismiss is hereby DENIED, for the reasons set forth in the court's order of August 31, 1990, and herein.

Plaintiff is present in this jurisdiction on a writ of habeas corpus ad testificandum issued on March 15, 1990. He shall remain here and shall be held at the D.C. Jail until disposition of this case, or further order of the court.

Plaintiff complained that he has been denied access to the law library at the D.C. Jail. Assistant Corporation Counsel Marty shall file a report with the court no later than January 2, 1990, regarding plaintiff's use of the law library. In his report, Mr. Marty shall also report regarding whether plaintiff has now been allowed to review his D.C. Department of Corrections' file.

SO ORDERED.

Royce C. Lamberth
United States District Judge

APPENDIX M

Date: Dec.21, 1990

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 91-7023

September Term, 1991
CA 89-03076

Leonard Rollon Crawford-El

U.S. Court of Appeals
For the District of
Columbia Circuit

v.

FILED Feb. 14, 1992

Patricia Britton

Appellant

BEFORE: Buckley, Williams and Lourie,* Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed January 27, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. §291(a).

Robert A. Bonner
Deputy Clerk

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD ROLLON CRAWFORD-EL
DCDC No. 176-323
Maximum Security Facility
P.O. Box 5200
Lorton, VA 22079
703/643-2256,

Plaintiff,

v.

Civil Action No. 89-3076 (RCL)

PATRICIA BRITTON
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001
202/673-7316

and

DISTRICT OF COLUMBIA
Serve: Mayor of D.C.
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202/727-6319,

Defendants.

FOURTH AMENDED COMPLAINT FOR DAMAGES, DECLARATION, AND INJUNCTION
(First and Fifth Amendments, Right of Court Access, and Common Law)

Nature of the Case

1. This is a civil rights and common law action by a District of Columbia prisoner against a D.C. Department of Corrections official and the District of Columbia. Plaintiff claims the official, Patricia Britton, diverted his property outside government control to an unauthorized person in violation of District of Columbia common law. Plaintiff also claims the diversion of his property violated his First Amendment rights to speak and to seek redress of grievances because Ms. Britton was motivated by hostility toward him due to his authorized communication with newspaper reporters, his informal requests for redress of grievances, his assistance to other prisoners in seeking redress, his authorized formation and leadership of a prisoner grievance committee, his persistent requests for return of his property, and his past, pending, and contemplated litigation against her, other Department of Corrections employees, or the District of Columbia. Apart from this claim of unconstitutional motive, plaintiff claims that Ms. Britton diverted his property either knowing, or with reckless disregard and deliberate indifference to whether, it included materials plaintiff needed to pursue legal redress--papers filed in pending federal civil actions he had brought *pro se* and *in forma pauperis*, papers recording the facts of contemplated federal court damage actions, and a photograph plaintiff reasonably believed to be evidence that would support a postconviction motion in his criminal case. Plaintiff claims Ms. Britton's diversion of these legal materials violated his First Amendment right to petition for redress, his constitutional right of court access, and his Fifth Amendment rights to substantive and procedural due

process. Plaintiff claims the District of Columbia is liable for Ms. Britton's common law violation under the doctrine of *respondeat superior*, and is liable for the constitutional violations either because Ms. Britton acted as a District of Columbia policymaker or because District custom, policy, or practice proximately caused her unconstitutional conduct.

Jurisdiction

2. The Court has jurisdiction under 28 U.S.C. §§1331, 1343(a)(3), 1367, and 2201.

Parties

3. Plaintiff, a lifelong resident of the District of Columbia, is and at all relevant times was a District of Columbia prisoner. He presently is confined in a District of Columbia Department of Corrections facility and is subject to the policies of the District of Columbia concerning prisoner property. Among plaintiff's property are his only copies of legal papers he needs to pursue administrative or judicial redress for legal wrongs, through proceedings in which he represents himself.

4. Defendant Britton is and at all relevant times was an employee of the District of Columbia Department of Corrections. At all relevant times, she was responsible for administering and formulating District of Columbia policy for a program of interstate prisoner transfers involving plaintiff. Plaintiff's claims arose from her acts done in exercise of this authority. Defendant Britton is sued in her individual capacity.

5. Defendant District of Columbia is a body corporate and defendant Britton's employer. The District is liable for unconstitutional acts either done by Ms. Britton in exercise of

policymaking authority or caused by District of Columbia policy, custom, or practice.

Facts

6. From about October 1985 until about the end of April 1986 plaintiff was a resident of the District of Columbia Department of Corrections Occoquan Facility in Lorton, Virginia. During that time defendant Britton was plaintiff's Classification and Parole Officer. Plaintiff was housed in K2 Dorm, but was employed as the Clerk for Captain Vera Brummell, who at the time was a lieutenant in charge of the Q Block Housing and Adjustment Board. Plaintiff typed, copied, and filed papers for the Board, and did other clerk duties. Ms. Britton's office was nearby in P Block. Plaintiff had frequent contact with Ms. Britton, since she often served on the Q Block Housing and Adjustment Board and plaintiff frequently went to P Block to photocopy papers as part of his duties. Ms. Britton persistently displayed toward prisoners a cavalier attitude-- manifesting a view that prisoners were beneath her, disentitled to dignity, and unworthy of civil treatment. Ms. Britton was hostile to plaintiff, in particular, because she knew plaintiff, when housed at the Central Facility before coming to Occoquan, had been in charge of the law library, had helped many prisoners prepare Administrative Remedy Procedure (ARP) grievance forms or appeals of disciplinary decisions, and had a reputation for asserting legal rights and knowing the administrative procedures for doing so. Ms. Britton deemed plaintiff "too big for his britches."

7. Plaintiff and several other prisoners perceived conditions at Occoquan to be terrible. Prisoners turned to plaintiff for assistance and leadership. On behalf of several prisoners plaintiff wrote numerous ARP complaints, noting such problems as unavailability of sufficient, proper clothing, and repeated inability of the correctional staff to "clear the count"

(ensure all prisoners are accounted for) in time for prisoners to get to their morning educational programs. Lt. Nelson was assigned to investigate these complaints and met several times with plaintiff to discuss them. On one occasion Lt. Nelson suggested that plaintiff should gather other prisoners and meet personally with Administrator Decatur to discuss conditions at Occoquan. Lt. Nelson asked plaintiff to write up the problems on one document and said he would transmit the document unofficially to Administrator Decatur and arrange a meeting with a prisoner delegation. Plaintiff wrote the document and then went from Dorm to Dorm selecting one representative and one alternate from each to join him as members of an Inmate Grievance Committee. Soon, a series of Committee meetings with the Administrator was held.

8. The activities of the Inmate Grievance Committee, though authorized, were controversial. Some correctional officers, like Lt. Nelson, approved, believing the communication process desirable to help diffuse tensions, which many perceived to be reaching an explosive level. Others, such as recently arrived Assistant Administrator Melvin Jones, were hostile. At one meeting Mr. Jones heatedly denounced the Committee. Plaintiff responded sharply, saying if Mr. Jones did not have a constructive contribution to make he should leave. Administrator Decatur then excused Assistant Administrator Jones from the meeting.

9. Ms. Britton was among those who were hostile to the Inmate Grievance Committee and to plaintiff's efforts to seek redress of prisoner grievances. On one occasion when plaintiff was typing Board papers in the Q Block office, Ms. Britton came in and said to Cpt. (then Lt.) Brummell in a caustic manner that she (Cpt. Brummell) should watch out for plaintiff and make sure he wasn't using the typewriter to write up ARPs or lawsuits. As Ms. Britton said this she stood over plaintiff to see what he was typing.

10. In April 1986 a prisoner mentioned to plaintiff that a reporter from The Washington Post had called to inquire about what was happening at Occoquan. Plaintiff then called reporters he knew at the paper and invited them to visit. Plaintiff submitted to Ms. Britton a visitor application. He indicated the address of the proposed visitors as 1150 15th Street, N.W., Washington, D.C. 20071, which is the address of The Washington Post. Ms. Britton approved the visitor application.

11. A reporter for the newspaper came to Occoquan and interviewed plaintiff, other prisoners, and Department of Corrections employees. Based on these interviews another reporter wrote a front-page article for the Sunday, April 20, 1986 issue of The Washington Post entitled "Jail Crisis Spills Into Occoquan Unit," with a subheading, "Crowding, Anger Grow as D.C. Inmates are Shifted to Va. Facility." Referring to plaintiff, the article said:

> In particularly crowded times, the floor of the cell block has been turned
> into a sleeping area for newly arrived inmates, according to Leonard Crawford, an inmate who served as the cell block's head clerk for four months and has organized a group of inmates pressing for better conditions. Crawford said staff members, documenting the reasons for holding the inmates in the cell block, simply wrote "lack of bed space" in the dorms.
>
> * * *
>
> Crawford said that when he arrived at Occoquan in October on a parole violation, a correctional officer searched the lockers of the other inmates in his dorm until he found one with three pairs of institution-gray trousers, and then gave one pair to him.
>
> * * *

While city officials credit the [educational] classes with a significant increase in the percentage of inmates passing the [high school] equivalency tests, only a few of the inmates whom corrections officials hoped to reach attend.

One teacher estimated the average class size at Occoquan at six or seven students. Crawford, an inmate now working as head clerk for the educational program, said that 135 of the nearly 600 inmates at Occoquan 2 are enrolled.

12. The day after the article was published, defendant Britton ordered plaintiff into her office. Corporal Barrett, then Officer in Charge of Dorm K2, escorted plaintiff there. Ms. Britton was visibly upset. After ignoring plaintiff for a considerable period, she asked him if he had arranged the visit by the reporter. When plaintiff said he had, she asked him how he had done it. Plaintiff showed her the visitor application naming the reporters invited and their address and pointed out that Ms. Britton had approved the application. Ms. Britton became enraged and accused plaintiff of tricking her. Plaintiff denied tricking her. Ms. Britton said plaintiff had embarrassed her before her coworkers by having the reporter come. Ms. Britton made a telephone call trying to get plaintiff placed in restrictive confinement in Q Block. When this effort failed she said that so long as plaintiff was incarcerated she was going to do everything she had to to make it as hard for him as possible. A few days later Ms. Britton had plaintiff transferred to the Department's Central Facility.

13. On October 31, 1986 plaintiff filed a lawsuit against the D.C. Department of Corrections in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia. The case was assigned No. SC 30003 '86. Plaintiff claimed that on Sunday August 24, 1986 his personal property--including clothing, jewelry, and photographs--was

stolen due to the failure of correctional staff to secure it upon committing plaintiff to control cells. On November 28, 1986, after trial, the court entered judgment for plaintiff in the amount of $553.00.

14. In October 1987 plaintiff, appearing *pro se*, filed *in forma pauperis* a federal court class action complaint challenging the failure of the D.C. Department of Corrections to provide to Islamic prisoners food compatible with their religious beliefs. Leonard R. Crawford-El v. Edwin Meese, Civ. A. No. 87-2808 (D.D.C. filed October 16, 1987). In early 1988 plaintiff filed another *pro se, informa pauperis* lawsuit claiming the D.C. Department of Corrections was violating his right to practice his religion. Leonard Rollon Crawford-El v. Mayor Marion Barry, Civ. A. No. 88-0715 (D.D.C. filed March 16, 1988). Shortly thereafter, plaintiff filed a *pro se, informa pauperis* federal court action seeking damages for legal malpractice. Leonard R. Crawford-El v. Samuel M. Shapiro, et al., Civ. A. No. 88-2339 (D.D.C filed August 17, 1988).

15. On December 14-15, 1988, while all of the lawsuits identified in paragraph 14 were pending, plaintiff was transferred with several other prisoners to the Spokane County Jail in Washington State. Ms. Britton had administrative and policymaking responsibility for the transfer and personally accompanied the prisoners on the trip. During the trip Correctional Officer Ballard, with Ms. Britton's knowledge, made a videotape of the prisoners while they were handcuffed, leg-shackled, and chained about their waists. Plaintiff and several others protested to Ms. Britton that the videotaping violated their privacy rights. Plaintiff said to her that the videotaping could not be done without the prisoners' written authorization. Ms. Britton responded, "You're a prisoner, you don't have any rights."

16. On arrival in Spokane, plaintiff, other prisoners, and corrections officials were interviewed by a reporter for The Washington Post. The reporter wrote a front-page article for the Sunday, December 18, 1988 issue of the newspaper under the headline, "Sudden Move Severs Inmates' Ties to D.C.; Isolation of Spokane Jail Puts Prisoners 'In a Firecracker Mood.'" Referring to plaintiff, the article stated:

> For three hours Friday, [Spokane] jail officials permitted a Washington Post reporter and photographer to speak and mingle freely with the District inmates--an opportunity that had been denied for months by officials of the beleaguered D.C. Department of Corrections.
>
> * * *
>
> Module 6W, where the District's prisoners have been isolated from the jail's population, is a surly, embittered place.
>
> * * *
>
> It is a place populated by convicts stripped not just of their liberty and their dignity, but also of the chance to hug their parents and watch their children and grandchildren grow. "We're in a firecracker mood," said Leonard Crawford-El, who is serving a life sentence for murder. "This is a bunch of angry, frustrated men."
>
> * * *
>
> The inmates are particularly suspicious that they were handpicked for transfer to Spokane because they were "jailhouse lawyers"--trouble-making "writ-writers" who tied up the courts with occasionally successful lawsuits against the prison system.
>
> "What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds," Crawford-El said.

> D.C. officials deny it, and insist that the main criterion for selecting the inmates was that none be eligible for parole before 1993.

17. Shortly after publication of this article, Ms. Britton told Captain Manning of the Spokane County Jail that plaintiff was a "legal troublemaker," meaning a prisoner who asserts her or his legal rights, or seeks administrative or judicial redress of grievances.

18. Within six months of the videotaping incident, plaintiff and other prisoners notified the District of Columbia under D.C. Code §12-309 of their claim for damages stemming from the videotaping. Later, in December 1989 plaintiff and the others filed suit against Ms. Britton, Officer Ballard, and the District of Columbia over the videotaping. The lawsuit is Alton A. Best, et al., v. The District of Columbia, et al., Civ. A. No. 89-3382 (LFO) (D.D.C.).

19. In late July 1989 plaintiff was informed by Washington State officials that all D.C. prisoners would be returning to D.C. facilities at Lorton, Virginia and that he must take all his property to the prison property room for boxing and shipping. Plaintiff did so and requested in writing that his property be mailed to him. Plaintiff's property--all properly obtained while incarcerated, and none of it contraband--was boxed and sealed with a written description of the property secured to the outside. The first entry in the written description stated the property included law books and ten legal folders. Among these papers were (a) plaintiff's only copies of documents filed in the lawsuits identified in paragraph 14, as well as those filed in two other federal court civil actions which plaintiff had brought *pro se* and *in forma pauperis*, Leonard R. Crawford-El v. Samuel Shapiro, et al., Civ. A. No. JFM-89-2060 (U.S. D. Ct., Md.), and Leonard R. Crawford-El v. Doctor Dugdale, et al., No. C89-377T3 (U.S.D.Ct., W.D. Wash.);

(b) plaintiff's only records pertaining to legal claims subsequently submitted pro se against the U.S. Marshals Service for loss of a watch and eyeglasses and against the U.S. Bureau of Prisons for injuries stemming from a beating by prison guards at the El-Reno Federal Correctional Institution; and (c) the only existing copy of a photograph plaintiff reasonably believed to be evidence that would support a postconviction motion in his criminal case.

20. On August 9, 1989, plaintiff was taken to the Western Missouri Correctional Center in Cameron, Missouri. On August 18, 1989 a group of D.C. correctional officers led by Ms. Britton arrived at the Center. Plaintiff and D.C. prisoners James Neal and Danny Phillips met with Ms. Britton. Each informed her that his property included legal material pertaining to current cases and that the legal material was necessary in order for them to seek redress from the courts. Ms. Britton smirked and acted and spoke in a cavalier manner. She informed plaintiff that she understood his need for both his personal property and legal material and that she would personally see to it that plaintiff would get them. She said she had decided not to have Washington State officials send plaintiff's property directly to him, and that she had told the officials to send all the D.C. prisoners' property to her office at 1923 Vermont Avenue, N.W., Washington, D.C. 20001. She said plaintiff's property would be given to him once he reached Lorton.

21. Shortly thereafter, plaintiff and other D.C. prisoners traveled from Cameron to Lorton by chartered buses. Ms. Britton was in charge and rode on one of the buses. As plaintiff and the others were being handcuffed and shackled to board the bus, Ms. Britton took possesion of property plaintiff had purchased or received in Cameron--canteen items, a letter with pictures, and stamps. Plaintiff placed these items in a paper bag with his name on it. At Ms. Britton's

direction, Correctional Officer J. T. Smith placed the paper bag, along with other paper bags containing prisoners' property, into a large plastic trash bag. Officer Smith placed the trash bag in the luggage compartment of one of the buses.

22. On August 19, 1989 the bus carrying plaintiff arrived at the Lorton Maximum Security Facility. Ms. Britton came on board plaintiff's bus and gave two prisoners property she personally had carried for them. Plaintiff asked Ms. Britton to give him the property in the trash bag in the luggage compartment. She ignored plaintiff and walked away. Subsequently, plaintiff and D.C. prisoner James Neal asked Ms. Britton about their respective legal materials. She ignored them.

23. Plaintiff never received his property in the trash bag in the luggage compartment. Subsequently, plaintiff sued Ms. Britton in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, No. SC 10003 90, seeking $72.50 in damages for her failure to return the property in the trash bag. Ms. Britton did not contest the claim. The District of Columbia paid the claim for her.

24. On August 19, 1989 Property Officer Cpl. R. Ward told plaintiff that his property from Washington State was not at the Lorton Maximum Security Facility. That day plaintiff called Ms. Britton's office. She declined to take the call. Plaintiff then wrote Ms. Britton requesting that his property be sent to him as soon as it was received by her. Plaintiff received no response to this letter.

25. Shortly thereafter, plaintiff noticed that other prisoners who had returned from Washington State had received their property. Plaintiff in late August 1989 wrote to the Director of the D.C. Department of Corrections, Walter Ridley, and

asked him to locate and deliver his property. Plaintiff received no response to this letter.

26. On September 7, 1989 plaintiff was transferred to the Federal Correctional Institution at Petersburg, Virginia. Before leaving, plaintiff saw prisoner John McNeill and others who had come from Washington State receive their property in Maximum Security R&D. At that time plaintiff and other prisoners bound for Petersburg spoke with Property Officer Cpl. R. Ward, who said none of them could take property to Petersburg because that was not their final destinations. Cpl. Ward said that if the prisoners wrote to him upon arriving at their final destinations their property immediately would be sent to them. Cpl. Ward also stated that if any prisoners did not want their property delivered to them, they had to sign a form authorizing release of the property to persons designated by them.

27. At no time did plaintiff sign a form authorizing release of his property to anyone besides himself.

28. Upon arriving at Petersburg, plaintiff learned from several other D.C. prisoners that Ms. Britton had been calling their parents or other relatives and telling them to come and pick up the prisoners' property or she was going to throw it away. Plaintiff immediately called his parents and told them that if they were called by Ms. Britton and asked to pick up plaintiff's property they were to refuse to do so. A few days later plaintiff again called his parents. His father told him that plaintiff's brother-in-law, Jesse Carter, had picked up plaintiff's property. Plaintiff became very upset upon hearing this, because he knew that once his property was outside the control of prison authorities he would have great difficulty getting permission to receive it. Plaintiff's mother became upset and hung up the phone.

29. Plaintiff called his brother-in-law, Jesse Carter, a D.C. government employee who does work at the Department of Corrections. Mr. Carter informed plaintiff that he had been called by Ms. Britton, that she had told him plaintiff was concerned about his legal materials and other property, that she was afraid that the property might get lost were she to send it from her office to the Lorton Property Officer for mailing to plaintiff, that she had asked Mr. Carter to pick up plaintiff's property and to keep it for plaintiff, and that Mr. Carter had picked up plaintiff's property at Ms. Britton's office. In fact, Ms. Britton had called Mr. Carter and asked him to pick up the property. He had done so and had taken the property to plaintiff's mother. Plaintiff asked Mr. Carter to take his property back to Ms. Britton so that it could be delivered to the Lorton Property Officer and mailed to plaintiff.

30. Plaintiff, still at Petersburg, told fellow D.C. prisoner Kenneth Ward what had happened to plaintiff's property. Mr. Ward became concerned about his own property, which included legal papers. Plaintiff and Mr. Ward spoke with a Bureau of Prisons official named Mr. Bender who advised them they could have their property sent to them upon arriving at their final destinations. Plaintiff and Mr. Ward then called Ms. Britton by telephone. To ensure Mr. Britton would accept the call, they arranged for Mr. Ward's friend in Seattle to call Ms. Britton without her knowing the call was a conference call with prisoners on the third line. Plaintiff and Mr. Ward told Ms. Britton that Mr. Bender had said they could have their property sent to them at their final destinations. Ms. Britton said Mr. Bender's information was incorrect and that she had no obligation to plaintiff and Mr. Ward regarding their property. Mr. Ward became frustrated trying to convince Ms. Britton he needed his legal materials. He called her a "dumb ass bitch" and she hung up the phone.

31. Thereafter, Mr. Carter went to see Ms. Britton and told her plaintiff wanted her to take the property back and deliver it to the Lorton Property Officer for mailing to plaintiff. Ms. Britton refused to do so. She said she did not see why plaintiff was making such a big fuss about his property because as far as she was concerned plaintiff should be happy she did not throw it in the trash. She told Mr. Carter federal prisons would not accept shipments of D.C. prisoner property.

32. Plaintiff requested that attorney Robert Hauhart seek return of plaintiff's property. By letter dated September 28, 1989 to Assistant Corporation Counsel Paul Quander, Mr. Hauhart requested that plaintiff's property, and that of D.C. prisoner Kenneth Ward, be returned to them. In part, the letter stated:

> It is my understanding from letters and conversations with my clients, and conversations and correspondence with Jay Alexander, Esq., . . . that Ms. Britton has declined to provide Mr. Ward and Mr. Crawford, and others in similar circumstances, with their legal materials, and has refused to forward their personal property.

33. On October 10, 1989 Mr. Hauhart wrote a letter to Arthur Graves, Associate Director of the Department of Corrections. Following the suggestion of Mr. Reeder, a member of Mr. Graves's staff, Mr. Hauhart enclosed a copy of his September 28 letter to Mr. Quander and said:

> Mr. Reeder stated that to the best of his knowledge residents returning from Washington State would have their property forwarded by the Department to their final BOP destination. This is the goal I seek on behalf of Mr. Crawford and Mr. Ward, as my letter to Mr. Quander makes clear. I assume this constitutes a reversal of the

> policies being pursued by Ms. Britton which were the source of my complaint. Please advise me at your convenience if Mr. Reeder is correct so I may advise my clients of the policy the Department [in]tends to follow.

34. On December 20, 1989 Mr. Hauhart again wrote Mr. Quander, who by then was Acting Deputy Director of the D.C. Department of Corrections. The letter was written on behalf of plaintiff, Kenneth Ward, and two other D.C. prisoners, James Neal and Edward Ashford, all four of whom were plaintiffs in the Alton Best litigation. The letter stated that the four prisoners still had not received their property. It said plaintiff's property had been "released without permission to Jesse Carter (brother-in-law), 4241 58th Ave, Apt. 9, Bladensburg, Md. 20710, (301) 277-0675." The letter requested Mr. Quander to "direct appropriate staff to arrange for locating and properly forwarding" plaintiff's property.

35. On January 9, 1990, Mr. Quander wrote in reply to Mr. Hauhart's December 20 letter. Mr. Quander stated:

> As pointed out in the attached letter dated December 22, 1989 from Mr. P.S. Wise, Administrator, Correctional Programs Branch, Bureau of Prisons, clear guidance regarding the processing of property of DOC inmates who are transferred to federal custody is provided.
>
> We are therefore moving with deliberate speed to dispatch inmates property, including the four (4) individuals cited in your correspondence, in compliance with mentioned direction given by the Bureau of Prisons.

The attached December 22 letter from Mr. Wise stated:

> As has been our past practice, inmates transferring from DCDOC to BOP custody are permitted only a small

amount of personal property which should be limited to personal care items and legal documents. This practice has been necessary based upon significant differences between DCDOC and BOP property policies and differences among individual BOP facilities. In special cases, we ask that DCDOC contact individual facility Inmate Systems staff for permission prior to mailing any inmate personal property to a BOP facility.

36. Neither Ms. Britton, nor any other District of Columbia official, contacted Mr. Carter or any member of plaintiff's family to retrieve plaintiff's property and to forward it to plaintiff by mail from the Department of Corrections.

37. Given the time that had elapsed, plaintiff believed Ms. Britton and the Department of Corrections would not timely act to retrieve his property and deliver it to him through prison channels. Consequently, he asked his mother to mail his property to him. She did so, at plaintiff's expense. Because the property was mailed outside prison channels, federal BOP officials at FCI Marianna, Florida, where plaintiff was housed, initially refused to allow plaintiff to receive his property. Plaintiff submitted an administrative complaint through FCI channels demanding that he be allowed to receive his property. The complaint caused several FCI Marianna officers and officials to become annoyed with and hostile to plaintiff. Plaintiff's administrative complaint ultimately succeeded. He was allowed to receive his property in February 1990.

38. In early February 1990 Mr. Quander wrote Mr. Hauhart a letter stating plaintiff's property had been released to Mr. Carter "after Mr. Crawford failed to indicate disposition of his property." Plaintiff, however, had not "failed to indicate disposition of his property." As noted above, plaintiff repeatedly had informed Ms. Britton, and had written

Mr. Ridley stating, that he wanted his property delivered to him.

39. Ms. Britton intentionally diverted plaintiff's property outside D.C. government control. She diverted plaintiff's property to Mr. Carter in the latter's capacity as plaintiff's brother-in-law, not in his capacity as a D.C. government employee. Ms. Britton knew she had no supervisory authority over Mr. Carter and that Mr. Carter's employment duties did not include handling prisoner property.

40. Ms. Britton received no information indicating plaintiff had authorized delivery of his property to any person other than himself. Ms. Britton diverted plaintiff's property to Mr. Carter either knowing the latter was not authorized by plaintiff to receive it, or with reckless disregard for and deliberate indifference to whether Mr. Carter was so authorized.

41. Ms. Britton withheld and diverted plaintiff's property

(a) out of hostility toward plaintiff stemming from his authorized communication with newspaper reporters, informal requests for redress of grievances, assistance to and authorized association with other prisoners seeking redress, persistent requests for return of his property, or past, pending, or contemplated litigation against her, other Department of Corrections employees, or the District of Columbia; and

(b) knowing, or with reckless disregard for and deliberate indifference to whether, plaintiff's property included materials he needed to pursue legal matters.

42. Ms. Britton had been delegated authority to establish District of Columbia policy on handling prisoner property in the program of interstate transfers for which she had

administrative responsibility. Her actions as to plaintiff's property were in exercise of that delegated authority.

43. In the alternative, Ms. Britton's actions as to plaintiff's property were proximately caused by the District of Columbia custom, policy, or practice of inadequately investigating, and not disciplining Department of Corrections employees for, wrongful deprivation of prisoner property.

44. In the alternative, Ms. Britton's withholding and diversion of plaintiff's only copy of (a) papers filed in federal court civil actions brought *pro se* and *in forma pauperis*, (b) papers recording facts relevant to contemplated damage claims within federal court jurisdiction, and (c) a photograph believed necessary for a postconviction motion in plaintiff's criminal case was proximately caused by the District of Columbia's custom, policy, or practice of separating prisoners from their property for indefinite periods (i) without regard to whether the property includes materials needed to pursue judicial redress, (ii) without either establishing written Department of Corrections policies recognizing and protecting prisoners' constitutional rights not to be unreasonably deprived of these materials, or training persons in positions such as Ms. Britton's to respect these rights, and (iii) without affording prompt informal hearings at which prisoners may inform a responsible official of her or his need to retain, or seasonably obtain, possession of particular legal materials in order to meet deadlines in, or otherwise properly to pursue, ongoing or contemplated legal proceedings, and through which prisoners upon adequate representation of their need may be allowed to retain designated materials, or be assured that particular materials will be returned within a period not prejudicial to their pursuit of redress.

45. As a result of Ms. Britton's withholding and diversion of his property plaintiff (a) incurred the expense of first class

mail delivery of his three heavy boxes from the District of Columbia to FCI Marianna, Florida; (b) incurred the expense of purchasing underwear, tennis shoes, soft shoes, and other items which he would not have needed to buy had his property been timely delivered; (c) suffered mental distress from the stressful communications with officials and family members, the deprivation of pictures of loved ones, worry that his property might permanently or indefinitly be withheld from him, worry that his pending legal proceedings would be prejudiced, and worry that his pursuit of the administrative complaint in FCI Marianna would adversely affect his relationships with FCI Marianna staff.

Claims

46. Ms. Britton's diversion of plaintiff's property outside government control to an unauthorized person constituted the common law tort of conversion, for which she is liable to plaintiff for nominal or compensatory as well as punitive damages.

47. Under the doctrine of *respondeat superior* the District of Columbia is jointly and severally liable with Ms. Britton for nominal or compensatory damages stemming from her conversion of plaintiff's property.

48. Ms. Britton's unconstitutionally-motivated withholding and diversion of plaintiff's property, as stated in paragraph 41(a), violated plaintiff's First Amendment rights to freedom of speech and to petition for redress of grievances. For this violation she is liable to plaintiff under 42 U.S.C. §1983 for nominal or compensatory as well as punitive damages.

49. Ms. Britton's withholding and diversion of plaintiff's property knowing, or with reckless disregard for and deliberate indifference to whether, it included materials he

needed to pursue legal matters, as stated in paragraph 41(b), violated plaintiff's First Amendment right to petition for redress of grievances, his constitutional right of court access, and his Fifth Amendment right to substantive due process, because the withholding and diversion unreasonably deprived plaintiff of his only copy of (a) papers filed in pending federal court civil actions he had brought *pro se* and *in forma pauperis*, (b) papers recording facts needed for contemplated damage claims within federal court jurisdiction, and (c) a photograph reasonably believed necessary for a postconviction motion in plaintiff's criminal case. For these violations Ms. Britton is liable to plaintiff under 42 U.S.C. §1983 for nominal or compensatory as well as punitive damages.

50. The District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her constitutional violations because, as stated in paragraph 42, these violations were committed in exercise of policymaking authority delegated to her by the District.

51. In the alternative, the District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her First Amendment violation stated in paragraph 48, because, as stated in paragraph 43, her violation was proximately caused by District custom, policy, or practice manifesting deliberate indifference to correctional officials' wrongful deprivations of prisoner property.

52. In the alternative, the District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her constitutional violations stated in paragraph 49 because, as stated in paragraph 44, these violations were proximately caused by

District custom, policy, or practice violating plaintiff's Fifth Amendment right to procedural due process, and manifesting deliberate indifference to prisoners' constitutional rights not to be unreasonably deprived of materials needed by them to pursue judicial redress.

Relief Requested

53. Plaintiff asks the Court

a. to assert jurisdiction over plaintiff's claims;

b. to declare that the District of Columbia customs, policies, or practices stated in paragraph 44 violate the First and Fifth Amendments and the constitutional right of court access;

c. to enjoin the District of Columbia--and each of its officers, agents, and employees having contact with or control or authority over plaintiff's property--from (i) depriving plaintiff of his legal materials without affording a prompt informal hearing as stated in paragraph 44(iii), and (ii) separating plaintiff from materials he reasonably deems necessary to pursue legal redress, for periods he reasonably deems likely to be prejudicial to that pursuit;

d. to award plaintiff compensatory damages for the injuries stated in paragraph 45, or at least nominal damages, and to hold Ms. Britton and the District of Columbia jointly and severally liable therefor;

e. to award plaintiff punitive damages against Ms. Britton;

f. to award plaintiff his costs and reasonable attorneys' fees under 42 U.S.C. §1988, and to hold Ms. Britton and the District of Columbia jointly and severally liable therefor;

g. to afford plaintiff such additional or alternative relief as the Court deems just.

Jury Demand

54. Plaintiff demands trial by jury of his damage claims.

Verification

I declare under penalty of perjury that the statements in paragraphs 1-38 and 45 above are true and correct and that the statements in paragraphs 39-44 above are believed true to the best of my knowledge.

Executed this _____ day of March, 1992.

_____
Leonard R. Crawford-El

Respectfully submitted,

_____
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Counsel for Plaintiff

(3)

No. 96-827

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

1. This case is about whether petitioner Crawford-El, a long-time prison inmate and experienced *pro se* litigator, can maintain a lawsuit in federal court seeking damages from a prison administrator personally. He alleges that Ms. Britton, an administrator at the District of Columbia's facilities at Lorton, Virginia, violated his constitutional rights when Crawford-El was being transferred through a series of institutions, by entrusting several boxes of Crawford-El's possessions--legal papers and some clothing--to his brother-in-law (who happened to be a guard at Lorton), rather than shipping them to his ultimate destination, a federal prison in Florida.

The brother-in-law gave the boxes to Crawford-El's mother, who mailed them to him in Florida. He received the boxes after a several-month delay (some of which was caused by his insistence that the boxes be returned to Lorton for shipping by the prison). See 93 F.3d at 845; Pet. App. at 74a) (Henderson, J., concurring). His injuries were the cost of postage (for which he reimbursed his mother), costs of replacing some shoes and underwear, and mental suffering.

Ms. Britton filed an affidavit stating that she gave Crawford-El's boxes to his brother-in-law to minimize the risk of loss. 93 F.3d at 828; Pet. App. at 32a. Crawford-El alleges that she did so to punish him for his previous exercise of First Amendment rights.[1/]

In the years before the alleged "diversion" of his boxes, Crawford-El had helped many prisoners file administrative grievances (93 F.3d at 826; Pet. App. at 29a), and he had been responsible for two front-page stories in *The Washington Post* about prison conditions; one in 1986 and one in 1988 (*id.* at 822; Pet. App. at 29a-30a). He had also brought a series of constitutional cases challenging a variety of prison policies. See 93 F.3d at 827; Pet. App. at 30a. See also 93 F.3d at 844, n.1, Pet. App. at 72a (listing cases and noting that all were found to be without merit).

Crawford-El alleges that Britton gave his boxes to his brother-in-law, rather than having them mailed to his ultimate destination, to punish him for this protected activity. Judge

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[1/]This allegation was belatedly added to this case on its first trip to the D.C. Circuit. See 951 F.2d at 1316; Pet. App. at 147a. Prior to that time, his federal claim was that Britton intended to impair his access to the courts in the future, rather than to punish him for what he had done in the past. *Id.*

Williams noted that "transfer of the boxes to the brother-in-law makes an awkward fit with any serious purpose to keep them from Crawford-El." 93 F.3d at 828; Pet. App. at 33a. Crawford-El's best proof that this was done to punish him was that, in 1986, more than three years prior to this 1989 "diversion", in anger at Crawford-El for having duped her into permitting a reporter to visit him, Britton said to him that she would make life hard for him.[2/] Judge Ginsburg pointed out that the probative force of that allegation was substantially nullified, not only by the years that had passed since the alleged statement, but also by the fact that he was not singled out for such "diversion" of property; at the same time, Britton was also directing the property of other prisoners to their relatives. 93 F.3d at 843; Pet. App. at 70a.

2. The Court of Appeals for the District of Columbia Circuit considered this case *in banc* to determine the proper pleading and summary judgment standards for resolving cases where a plaintiff brings a claim for damages against a government official personally that turns on the official's motive, and the official asserts a qualified immunity defense. The problem arises from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Prior to *Harlow*, an official accused of a constitutional violation in the course of performing a discretionary function within the sphere of his official responsibility was immune from personal liability unless *either* he knew or reasonably

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[2/]The uncorroborated allegations concerning this alleged incident were first made in this action after the District, relying on the D.C. Circuit's then-new decision in *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 500 U.S. 226 (1991), first made the argument that his claim had to be supported by direct, rather than circumstantial, evidence.

should have known that his conduct would violate the plaintiff's constitutional rights *or* he took the action with the malicious intention of causing constitutional injury. *Id.* at 815. In other words, the immunity defense had both an objective and a subjective component. *Harlow* reformulated the standard to eliminate the subjective component. Henceforth, an official was to be immune from personal liability if his conduct was objectively reasonable as measured by clearly established law: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.[4] The defense could no longer be defeated by "bare allegations of malice." *Id.* at 817

The reason for this reformulation was that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. Subjecting government officials to potential monetary liability always entails costs such as "distraction of officials from their governmental duties, inhibition of discretionary action and deterrence of people from public service." *Id.* at 816. In addition, however, "[t]here are special costs to 'subjective' inquiries ...." *Id.* Those costs are the "burden of broad-reaching discovery" and the "costs of trial." *Id.* at 817-818. In cases requiring "[j]udicial inquiry into subjective motivation," "there is often no clear end to the relevant evidence." *Id.* at 817. Therefore, "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Id.*;

[4]However, "in extraordinary circumstances," an official would also be entitled to qualified immunity if he could prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819.

footnote omitted. Further, "questions of subjective intent . . . rarely can be decided by summary judgment." *Id.* at 816. Accordingly, "[t]he subjective element of the [qualified] immunity defense has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-816. It was to avoid these special burdens of discovery and the trial of insubstantial claims that the Court reformulated the defense of qualified immunity in objective terms: "[w]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burden of broad-reaching discovery." *Id.* at 817-818.

However, there are constitutional torts that turn entirely on whether the defendant acted with a proscribed motive. This case involves one of them. The constitutionality of respondent Britton's action (assuming that it has caused a significant injury) depends entirely on whether she routed Crawford-El's boxes via his brother-in-law to punish him for his exercise of rights protected by the First Amendment. The question in such cases is how the objectives of *Harlow*--avoiding the discovery and trial burdens ordinarily entailed where there is judicial inquiry into subjective motivation--can be met. The opinions below represent the *in banc* court's collective judgment as to the most appropriate answer.

3. As Judge Edwards points out (93 F.3d at 847; Pet. App. at 78a), a clear majority of the D.C. Circuit agrees that in such motive-based constitutional tort cases, qualified immunity should be asserted and resolved on summary judgment. See 93 F.3d 823, 824-825; Pet. App. at 22a, 24a-25a (plurality opinion); *id.* at 838, 842; Pet. App. at 58a, 65a (Ginsburg opinion); *id.* at 847; Pet. App. at 78a (Edwards opinion). See also 93 F.3d at 834, Pet. App. at 46a (Silberman opinion) (test depends on defendant official's

assertion of reason for challenged conduct). Furthermore, while the various opinions below take different approaches as to the standards and procedures by which a properly asserted claim of qualified immunity should be resolved, we believe that they yield two holdings that the district court in the Circuit must treat as governing. The first is that, in order to defeat a claim of qualified immunity in a case that turns entirely on the defendant's motive, the plaintiff must establish the proscribed motive by clear and convincing evidence. 93 F.3d at 821-823; Pet. App. at 16a-18a (Williams' opinion). The second is that the plaintiff is not entitled to discovery in order to carry this burden unless he can also show, through the evidence he has in hand, that there is a "reasonable likelihood" that the discovery he seeks will "support his specific factual allegations concerning the defendant's motive" and, that, so supported, his evidence will meet the clear and convincing standard. 93 F.3d at 841; Pet. App. at 63a-64a (Ginsburg opinion).

a. The opinion for the court was authored by Judge Williams. He formulates the principle that, in motive-based constitutional tort cases where the defendant asserts qualified immunity, to defeat a motion for summary judgment, the plaintiff must present evidence which clearly and convincingly establishes that the official acted with the proscribed motive.

Judge Williams starts from the premise that an appropriate resolution of the problem must balance the interest in providing plaintiffs with a damages remedy against officials who violate their constitutional rights, on the one hand, against the costs to effective government described in *Harlow* -- namely, discovery that is "peculiarly disruptive" of government and the necessity of trying insubstantial claims -- on the other. 93 F.3d at 819, 821-822; Pet. App. 12a-13a,

16a-21a. He points out that, without some adjustment of the standards and procedures ordinarily employed, litigation over an official's motives will create the very burdens and costs *Harlow* sought to avoid. *Id.* at 821; Pet. App. at 17a.

Judge Williams also points out that, when ordinary rules of litigation have been found to threaten important policies, a standard judicial response has been to adjust the burden of proof that applies. *Id.* at 822; Pet. App. at 18a. An adjustment employed in a variety of circumstances is to require clear and convincing evidence. *Id.* Indeed, Judge Williams notes that in establishing such a clear and convincing burden of proof in defamation cases against public figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964), explicitly drew upon the reasoning of *Barr v. Matteo*, 360 U.S. 564 (1959). *New York Times Co. v. Sullivan* "recited *Barr's* entire litany of social costs of officer liability--essentially those later invoked in *Harlow*--as a parallel justifying the adoption" of a clear and convincing standard of proof. *Id.* at 823; Pet. App. at 21a. If a clear and convincing burden of proof is appropriate in public figure defamation cases, it is equally sound for personal damages cases against public officials involving motive-based constitutional torts. *Id.*

Judges Ginsburg and Henderson specifically concurred in this ruling on the clear and convincing burden of proof standard. See 93 F.3d at 838, 839; Pet. App. at 58a (Ginsburg opinion); *id.* at 844; Pet. App. at 72a) (Henderson opinion). As Judge Williams notes, however, Judge Ginsburg's opinion is controlling on the discovery question. 93 F.3d at 829; Pet. App. at 32a.[4/]

[4/]Relying on *Harlow's* teaching that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed," 457 U.S. at

(continued...)

b. Judge Ginsburg would permit a plaintiff discovery to meet the defendant's motion for summary judgment on qualified immunity grounds, but only where the plaintiff can show that the discovery he seeks is 1) reasonably likely to produce evidence to support his specific factual allegations regarding the defendant's impermissible motive, and 2) his allegations, supported by the evidence he will likely discover, will establish impermissible motive under the clear and convincing standard. 93 F.3d at 841; Pet. App. at 63a-64a.

c. Judge Silberman, writing only for himself, urges a different approach.[5/] However, while Judge

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[5/](...continued)
818, Judge Williams would not permit a plaintiff to engage in discovery to oppose a defendant's assertion of qualified immunity: "plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact-finder could infer the forbidden motive." 93 F.3d at 819; Pet. App. at 13a.

Judge Ginsburg rejects this absolute preclusion of discovery because, in his view, it would undermine too greatly the deterrent effect of constitutional tort damages actions. 93 F.3d at 840; Pet. App. at 61a.

[5/]He, too, would require that a defendant state a reason for the conduct challenged. But thereafter Judge Silberman urges, whether the defendant prevails should turn not on any inquiry into whether the defendant was actually motivated by that reason (or any other), but instead on whether the reason stated is "objectively reasonable under the circumstances." 93 F.3d at 835; Pet. App. at 49a. Once the defendant states a constitutionally permissible reason, "only an

(continued...)

Silberman's approach is different from the five judges who specifically join Judge Williams as to a clear and convincing the standard of proof, Judge Silberman expressly states that Judge Williams' approach is preferable to that of Judge Edwards' opinion. 93 F.3d at 833; Pet. App. at 45a. Furthermore, Judge Silberman would clearly agree with Judge Ginsburg that discovery into subjective motivation prior to summary judgment must be limited.[6/] Apparently for those reasons, Judge Silberman has called his opinion "concurring," rather than stating that he is simply "concurring in the

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[5/](...continued)
objective inquiry into the pretextuality of the reason is allowed." *Id.* at 834; Pet. App. at 46a. Such an objective inquiry is "without regard to [the defendant's] actual intent." *Id.* at 83a; Pet. App. at 50a. The factfinder instead asks whether a hypothetical official would have been acting reasonably under the circumstances shown by the plaintiff if such an official were motivated by that reason in those circumstances. *Id.* at 835; Pet. App. at 49a. To avoid summary judgment, the plaintiff must create a dispute of fact about whether a hypothetical official could have acted reasonably if he had acted from the reason posited and the official's actual subjective motivation is irrelevant.

However, Judge Silberman would also permit defendants to establish immunity, even if their actual reason was not objectively reasonable, "if they are able to prove that their actual reason was legitimate." *Id.* at 836; Pet. App. at 50a. He does not say whether actual motivation could be raised on summary judgment, or if, given "objective pretextuality," it must be resolved by trial.

[6/]Judge Silberman states that he agrees with Judge Williams as to the limited extent to which discovery concerning state of mind is permitted (*i.e.*, to establish what the defendant knew, not why he acted). *Id.* at n.9 ("I . . . agree that a plaintiff is entitled to discovery for certain other purposes. Judge Williams' Op. at 820-21.")

judgment."

d. Except to the extent that it concurs that official immunity must be resolved on summary judgment (93 F.3d at 849, Pet. App. at 82a), Judge Edwards' opinion is limited to "concurring in the judgment to remand." 93 F.3d at 847; Pet. App. at 78a. Judge Edwards criticizes the "clear and convincing" standard for proving motive in these cases as threatening "a devastating impact on potential plaintiffs who already face substantial burdens in attempting to pursue civil rights claims." 93 F.3d at 850; Pet. App. at 86a. He argues that there is no precedent in this Court authorizing such a standard (*id.* at 853; Pet. App. at 91a-92a); that no other court of appeals has adjusted the burden of proof in motive-based tort cases (*id.* at 852 & n.7; Pet. App. at 88a & n.7); and that there is insufficient empirical evidence that "government officials . . . are being subjected to intolerable litigation burdens from intent-based civil rights suits or that district court judges are routinely permitting frivolous claims to go forward." *Id.* at 852; Pet. App. at 90a; footnote omitted. However, Judge Edwards argues that the plaintiff's specific factual allegations in this case are sufficient to withstand a motion for summary judgment. *Id.* at 853; Pet. App. at 92a.

ARGUMENT

There is no need for the Court to review at this time the new solution the District of Columbia Circuit has devised for the vexing question of how claims of official immunity should be treated where government officials are sued personally for motive-based constitutional torts. The circuit's solution -- carefully limiting discovery prior to summary judgment and requiring that impermissible motive be shown on summary judgment by clear and convincing evidence--is a new approach to a problem that has been troubling the circuits

for nearly 15 years. See the plurality opinion 93 F.3d at 817-818, Pet. App. at 7a-11a, and Judge Edwards' opinion at 847-848, 851 n.7; Pet. App. at 80a-82a, 88a, n.7. It is a solution that has much to recommend it. It responds directly to the costs to effective government that *Harlow* teaches are ordinarily entailed by judicial inquiries into motive--namely, unavoidable and potentially broad-reaching discovery and the inability to resolve insubstantial claims short of trial. It makes eminent sense here, promising a likely resolution of this clearly insubstantial (and apparently contrived) claim short of trial.

The Court should give the courts of appeals an opportunity to consider how well this solution works in other developed factual contexts. The very fact that the courts of appeals have struggled with this issue for so long without reaching a clearly satisfactory resolution strongly suggests that a new approach, such as that which has emerged in this case, should be subjected to significant testing--both by seeing how it works in a variety of contexts, and by the scrutiny of other appellate courts--before this Court accepts or rejects it.

There is no real need for the Court to preclude such testing at this time. The D.C. Circuit's resolution is so new that there is now no significant conflict between the circuits.

1. As shown in the Statement (11-12 above), the opinions below do yield two principles for cases of this kind which the district court must treat as governing (and is in fact treating as such[7]). They are 1) raising to clear and convincing the burden of proof that plaintiffs must meet to overcome an assertion of qualified immunity in motive-based

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[7]See *Byrd v. Moseley*, 942 F.Supp. 642 (D.D.C. 1996)(treating the clear and convincing standard as governing).

constitutional tort cases, and 2) limiting discovery to evidence which plaintiff can show a) is likely to support the specific factual allegations that undergird his bad motive claim, and b) will enable him to carry his clear and convincing burden of proof.[N]

Even if there were no "governing law" of the circuit, however, that would not constitute a reason for this Court to undertake to review this case now. Rather, that would suggest even more strongly that the courts of appeals should be given a further opportunity to attempt to fashion a satisfactory solution.

In any event, it is absolutely clear that Judge Silberman's position --that the question on summary judgment should only be the "objective reasonableness" of the motive stated for the challenged conduct -- is not governing law; no other judge joined his opinion. Accordingly, there is no basis for petitioner's second "Question[] Presented."

2. The *in banc* rulings below represent a significant advance concerning the vexing question of official immunity for motive-based constitutional torts. The courts of appeals have been struggling with the question since at least *Hobson*

[N]Judge Silberman is the decisive sixth vote below. His opinion makes the position of Judge Ginsburg governing because 1) on burden of proof, he expressly states his preference for Judge Williams' (and Ginsburg's) resolution to that of the five judges who join in Judge Edwards' opinion; 2) on discovery, Judge Ginsburg's opinion is a subset of Judge Silberman's (Judge Silberman, like Judge Williams, would preclude discovery regarding motive prior to summary judgment; Judge Ginsburg would permit it in limited circumstances); and 3) Judge Silberman stated that his opinion was "concurring," rather than "concurring in the judgment."

v. Wilson, 732 F.2d 1 (D.C. Cir. 1984). Most of the appellate decisions prior to the decision below have focused on whether, to foreclose such a defense, a plaintiff with a motive-based tort claim must plead specific facts. See the cases discussed in Judge Edwards' opinion below, 93 F.3d at 851 n.7; Pet. App. 88a n.7. To the extent such approaches contemplate resolution by motion to dismiss, they operate to exclude discovery. However, they constitute a significant departure from the regime of "notice pleading" established by the Federal Rules of Civil Procedure. See *Kimberlin v. Quinlan*, 6 F.3d 789, 803-804 & n.4 (D.C. Cir. 1993) *vacated and remanded*, ___ U.S. ___, 115 S. Ct. 2552 (1995) (Edwards, J., dissenting).

In addition, an approach which relies on pleading requirements and resolution by motion to dismiss is not well-adapted to distinguish claims that are insubstantial from those that are not. This difficulty led the D.C. Circuit to hold that a plaintiff must assert or produce evidence of a certain kind -- direct, rather than circumstantial -- to overcome an official's assertion of qualified immunity. See the plurality opinion below, 93 F.3d at 818; Pet. App. at 10a. In the decision below, the D.C. Circuit has abandoned that approach.

As then-Judge Ruth Bader Ginsburg recognized in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1434-1438 (D.C. Cir. 1987), a more direct response to *Harlow's* concerns about discovery and trying insubstantial claims is to limit discovery and to adjust the rules on summary judgment. However, other than the discussion in *Martin*, the opinions below constitute the only extended discussion we know of as to precisely how and why each of these should be done. *Martin* led to a detour by the D.C. Circuit on the now-abandoned "direct evidence" approach. See the plurality opinion, 93 F.3d at 817-818; Pet. App. at 9a-11a. Perhaps

the most helpful discussion elsewhere, in *Elliott v. Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), has been characterized as "cryptic" on crucial issues. See Judge Silberman's opinion, 93 F.3d at 833; Pet. App. at 45a.

3. The governing principles of this case are a direct and narrow response to the concerns informing *Harlow*. The difficulty of terminating insubstantial claims of subjective intent without trial is directly addressed by requiring a plaintiff to make a clearer showing that a defendant has acted with a proscribed motive. The burdens of discovery are addressed by requiring a plaintiff to make a special showing to justify it: that what the plaintiff has in hand shows a reasonable likelihood that the discovery sought will produce evidence sufficient to support his factual allegations and that, so supported, his specific allegations will establish his claim. Ginsburg opinion, 93 F.3d at 841; Pet. App. at 63a-64a.

Neither of these solutions is particularly novel. As Judge Williams points out (93 F.3d at 822-823; Pet. App. at 18a-19a), such an adjustment to the burden of proof has been effected in a variety of circumstances where the ordinary preponderance standard has been deemed insufficiently protective of important public policies. Nor is a policy-based limitation of discovery, defeasible on a special showing, unusual. See *Hickman v. Taylor*, 329 U.S. 495, 510-512 (1947), and its progeny and the resulting 1970 amendment to Fed R. Civ. P. 26(b)(3).[9/]

[9/]Furthermore, Judge Ginsburg is surely right that the fact that Fed. R. Civ. P. 56(f) invests the district courts with discretion as to when to permit discovery that a party asserts it needs to oppose summary judgment does not authorize the court to ignore the public policy concerns that arise when discovery is sought to establish a public

(continued...)

These solutions seem sensibly to accommodate the need to provide a money remedy for motive-based constitutional torts, on the one hand, and the interference with effective government caused by permitting judicial inquiry into subjective motivation, on the other. A modestly enhanced burden of proof for the plaintiff is justified on the inarguable ground that "unconstitutional motive is . . . easy to allege and hard to disprove." Plurality opinion, 93 F.3d at 821; Pet. App. at 25a. Certainly this litigation provides strong proof of that proposition.

The notion that Ms. Britton would try in 1989 to punish petitioner Crawford-El for speaking to the press in 1986 and 1988 by routing his boxes via his brother-in-law is so unlikely as to be fairly characterized as "absurd." Judge Henderson's opinion, 93 F.3d at 845; Pet. App. at 35a. Indeed, there is no reason to doubt Judge Silberman's contention that, not long ago, any American judge or lawyer would have been incredulous to hear that such a case could plausibly be brought in federal court. 93 F.3d at 829; Pet. App. at 92a. Nevertheless, Judge Edwards' opinion insists that this case must survive summary judgment and apparently needs to be tried. See Judge Edwards' opinion, 93 F.3d at 853; Pet. App. at 92a. If cases like this one need to be tried, then the costs to which the government will be subject--in burdens on both defendant executive officials, and on the courts--will be very great indeed. *Harlow* will have no meaning where motive-based constitutional torts are involved. There will be an incentive for potential plaintiffs to multiply lawsuits because, after the first one, they can credibly charge

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[9/](...continued)
official's subjective intent. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975) (discretion must be exercised in light of relevant public policies).

any defendant with retaliation for any subsequent, arguably adverse treatment. Needless to say, such a result will provide a powerful lever for prisoner litigants, like petitioner, to use to harass and intimidate their keepers.

4. Although the principles that emerge from the D.C. Circuit's resolution of this case are a rational response to the threats to effective government *Harlow* sought to protect against, and seem sensible as applied to the facts of this case, the Court should permit them to be further tested before deciding whether they should govern all assertions of qualified immunity in motive-based constitutional tort cases. The formula "clear and convincing evidence" will only acquire meaningful content when applied in developed, concrete circumstances. After there is experience in applying it, the Court can assess with much more assurance whether it may have the "devastating impact" predicted by Judge Edwards, or whether it will effectively weed out only claims, like petitioner's, that are clearly lacking in merit and costly to effective government.

Further experience may also show whether these principles work, or may need adjustment or elaboration, in various contexts. Judge Silberman points out (93 F.3d at 836; Pet. App. at 51a), for example, that in many cases, the fact that defendant has acted in part from a proscribed motive does not end the inquiry, but only launches further inquiry to assess the relative importance of proscribed and justifiable motives. At least one court of appeals has struggled with an assertion of qualified immunity in one of these "mixed motive" cases. *Foy v. Holston*, 94 F.3d 1528, 1534-1536 (11th Cir. 1996). The court of appeals there suggested that, at least where it is clear that the defendants acted in part from a motive which provides an overriding justification for the conduct at issue (there, responding to credible evidence that

child abuse was taking place), the fact that the defendants may also have acted from an impermissible motive (there, bias against plaintiff's religious practices) can be deemed irrelevant. *Id.* at 1535 & nn.8, 9, *citing Mt. Healthy v. Doyle*, 429 U.S. 274 (1979). There should be an opportunity to assess whether and how the principles developed below might apply to such situations and others.

5. There is no compelling reason for this Court to attempt to resolve these questions definitively at this time. The principles elaborated below are sufficiently new so that other courts of appeals have not had the opportunity to scrutinize them in any meaningful way.[10] The only appellate decision we have found that has arguably rejected the approach below is that in *Grant v. City of Pittsburg*, 98 F.3d

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[10]Most of the prior cases cited by Judge Edwards, 93 F.3d at 851, n.7; Pet App. at 88a, n.7, concern the amount of specificity required in pleadings, and do not involve summary judgment at all. Several of those that do address summary judgment standards can be read to suggest that an enhanced summary judgment standard should be employed. See, *e.g.*, *Blue v. Koren*, 72 F.3d 1075, 1085 (2nd Cir. 1995) (referring to a "heightened evidentiary standard," and rejecting on policy grounds reliance on circumstantial evidence arguably probative of retaliatory intent--that following the plaintiff's victory over the government in administrative proceedings, plaintiff was subjected to a rigorous investigation); *Branch v. Turnell*, 937 F.2d 1382, 1388 (9th Cir. 1991) (using the formulation that the opponent of summary judgment must make a "substantial showing"). Others, which seem to say that the opponent need only create a dispute of relevant fact, have involved situations where the opponent has produced strong evidence of improper motive. See *e.g.*, *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994). None of these cases focuses, specifically on whether the plaintiff's burden of proof to overcome an assertion of immunity is preponderance of the evidence or some higher standard.

116, 126 (3rd Cir. 1996). There referring to the plurality opinion in this case, the court agreed with "a reasonable limitation on discovery," but rejected "a heightened summary judgment standard." *Id.*

However, the Third Circuit did not examine summary judgment principles in cases of this kind in any developed factual context,[11/] nor did it mention the clear and convincing standard of proof.[12/]

We submit that the new approach that the D.C. Circuit has evolved should be subjected to more exacting and extensive scrutiny before this Court definitively resolves the question of what a plaintiff must show to overcome an assertion of qualified immunity in a motive-based constitutional tort case and how he may go about doing so.

[11/]The Third Circuit's ruling was entirely in the abstract, since its holding was that the district court had not adequately identified the facts necessary for it to resolve the matter. *Id.* at 17[illegible].

[12/]The Third Circuit only mentioned the "direct evidence" rule and cites the plurality opinion below only to a page (93 F.3d at 817; Pet. App. at 7a-9a) discussing the development of that now-abandoned approach.

CONCLUSION

The petition should be denied.

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No. 96-827

In the Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL, PETITIONER

v.

PATRICIA BRITTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, in response to a defendant public official's assertion of qualified immunity, a plaintiff must prove by clear and convincing evidence the intent element of a constitutional tort claim of retaliation for the exercise of First Amendment rights.

2. Whether a public official asserting qualified immunity is entitled to summary judgment before discovery if the official alleges a legitimate justification that would have been a reasonable basis for the challenged action, without regard to whether it was the actual motive.

3. Whether other protections are appropriate to serve the purposes of qualified immunity by shielding defendant public officials from the burdens of litigation regarding their intent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Petitioner was convicted of murder and is serving a life sentence in the District of Columbia's correctional system. Pet. App. 3a. In 1989 petitioner sued under 42 U.S.C. 1983, seeking money damages from respondent, a District of Columbia correctional official, in her personal capacity. He alleged that respondent violated his due process rights and his right of access to the courts by causing several boxes containing personal items, including legal papers, to be misdelivered. See generally Pet. App. 3a, 146a-147a, 154a-160a. On remand to the district court following an interlocutory appeal, petitioner amended his complaint to

add a First Amendment claim that respondent caused the misdelivery of petitioner's boxes in retaliation for petitioner's statements to the press, his filing of grievances and lawsuits, and his assistance of other prisoners in filing grievances. See generally *id.* at 4a, 28a-34a, 126a, 175a-191a. Only the First Amendment claim is at issue here.[1]

1. In 1990, the district court denied motions to dismiss petitioner's due process and court-access claims, Pet. App. 161a-169a, but on respondent's interlocutory appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the court of appeals held that the complaint did not satisfy applicable pleading requirements, Pet. App. 145a-162a. The court remanded to permit repleading. *Id.* at 160a; see *id.* at 119a-120a. Noting that in his appellate brief petitioner had also articulated a First Amendment claim, the court of appeals noted that "[p]ermission to file additional amendments to the complaint, such as to raise plaintiff's new First Amendment theory, lies in the sound discretion of the district court." *Id.* at 147a, 160a.

2. On remand, petitioner filed a Fourth Amended Complaint that included the First Amendment claim at issue here. Petitioner alleged that respondent "withheld and diverted" his property "out of hostility toward [petitioner] stemming from his authorized communications with newspaper reporters, informal requests for redress of grievances, assistance to and authorized association with other prisoners seeking redress, persistent requests for return of his property, or past, pending, or contemplated litigation against her, other Department of Corrections employees, or the District of Columbia." Pet. App. 189a (Complaint ¶ 41); see *id.* at 175a-181a (Complaint ¶¶ 6-18). He and several other prisoners had been transferred from a

[1] Petitioner also raised common-law claims and Section 1983 claims against the District of Columbia. See Pet. App. 97a-99a.

District of Columbia prison to a facility in Spokane, Washington, in 1988. *Id.* at 179a-180a (Complaint ¶¶ 15-16). Petitioner alleged that, upon his re-transfer to facilities on the East Coast in 1989, respondent retaliated against him by having his boxes of personal effects—which he claims she knew contained legal materials relating to ongoing cases—delivered to his brother-in-law outside the prison system, thereby delaying petitioner's receipt of the materials. *Id.* at 181a-182a, 183a-189a (Complaint ¶¶ 19-20, 24-40). Petitioner alleged that, as a result of the delay, he incurred "the expense of first class mail delivery of his three heavy boxes" and "the expense of purchasing underwear, tennis shoes, soft shoes, and other items," and that he suffered mental distress. *Id.* at 190a-191a (Complaint ¶ 45).

3. On February 15, 1994, the district court granted respondent's motion to dismiss the Fourth Amended Complaint. Pet. App. 115a-143a. The court held that the First Amendment claim failed to meet the District of Columbia Circuit's requirement that a plaintiff plead "specific *direct* evidence of intent." *Id.* at 128a (quoting *Kimberlin* v. *Quinlan*, 6 F.3d 789, 793 (D.C. Cir. 1993), vacated on other grounds, 115 S. Ct. 2552 (1995)). The court concluded that his allegations "are entirely circumstantial," *id.* at 129a, "[a]t best" showing that respondent "was hostile towards him generally and callous in her regard for constitutional rights," *id.* at 130a-131a.[2]

4. A panel of the court of appeals affirmed the dismissal of some of petitioner's claims, Pet. App. 100a-106a,

[2] The court also dismissed petitioner's claims of denial of procedural and substantive due process, right of court access, and right to petition for redress of grievances, and dismissed his state-law claim of conversion for lack of pendent jurisdiction. Pet. App. 113a-114a, 120a-125a, 131a-141a.

but the en banc court decided *sua sponte* to review the First Amendment retaliation claim and to reexamine its requirements for presenting motive-based constitutional claims against public officials, *id.* at 107a-109a. The en banc court ordered further briefing on five questions, including whether the court should retain its "direct evidence" rule (requiring direct as opposed to circumstantial evidence of unconstitutional motive to overcome an official's qualified immunity defense), and, if not, whether there are any "alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation." *Id.* at 109a.

In the en banc proceedings, the United States filed an amicus brief and presented oral argument. The United States asked the Court to reject the direct evidence standard. See Brief for the United States as Amicus Curiae Upon *In Banc* Consideration, *Crawford-El* v. *Britton* (D.C. Cir.) (No. 94-7203) (U.S. En Banc Br.). In its stead, the United States' brief proposed that, in motive-based constitutional tort cases where the defendant asserts a qualified immunity defense, the court should, at the motion-to-dismiss stage, require allegations raising a "strong inference" of improper motive. *Id.* at 27-32.

The United States further argued below that, at the summary judgment stage, "the plaintiff should be required to offer evidence that, at a minimum, creates a genuine dispute about facts that raise a strong inference of improper motive." U.S. En Banc Br. 35. The United States noted that, although "there is no firm bar against discovery before a court rules upon a motion for summary judgment," motive-based constitutional claims against defendant officials call for "strict application" of Federal Rule of Civil Procedure 56(f). *Id.* at 36. In particular, the United States contended that "the plaintiff must be required to explain in detail what discovery is necessary and why, and the court should only permit discovery where it is clearly warranted." *Id.* at 38. Because the case had been resolved on the pleadings in the district court and had not reached the summary judgment stage, the United States argued that the en banc court should not decide whether it would be appropriate to require that a plaintiff meet additional procedural requirements or a higher standard of proof to defeat summary judgment or to prevail at trial. *Id.* at 35.

5. On August 27, 1996, the court of appeals issued its en banc decision. Pet. App. 1a-99a. Judge Williams filed an opinion joined by Judges Sentelle, Buckley, and Henderson (*id.* at 2a-34a), with concurring opinions by Judges Silberman (*id.* at 35a-57a) and Henderson (*id.* at 72a-77a), and an opinion by Judge Ginsburg concurring in part (*id.* at 58a-71a). Chief Judge Edwards, joined by Judges Wald, Randolph, Rogers, and Tatel, filed an opinion concurring in the judgment to remand. *Id.* at 78a-95a.

a. A clear majority of the court rejected the direct evidence rule, Pet. App. 9a-12a, 58a, 72a, 78a, with only Judge Silberman stating that he would have adhered to that rule, *id.* at 43a-44a.

b. Judge Williams, in an opinion in which a majority of the court concurred in part, called for new rules to protect public officials from the burdens of litigating claims that they acted with an unconstitutional motive.[3] He noted that the court's "inquiry is framed by the competing goals described by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S 800, 816-818 (1982)—vindicating constitutional rights but at the same time protecting officials from

[3] Judge Williams concluded that petitioner had alleged a violation of a clearly established First Amendment right, Pet. App. 26a-27a, and that his injury was not de minimis, *id.* at 27a-28a.

exposure to discovery and trial that would unduly chill their readiness to exercise discretion in the public interest." Pet. App. 2a-3a. In view of the court's rejection of the direct evidence rule, Judge Williams identified two new rules that he characterized as "adequate alternative means of reconciling *Harlow*'s twin purposes in the context of constitutional torts dependent on the official's having an improper motive" (*id.* at 11a): First, an official should be entitled to "summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue," and, second, "unless the plaintiff offers clear-and-convincing evidence of the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Id.* at 3a.[4] A majority of the court concurred in the adoption of the clear-and-convincing-evidence standard, but not in the *per se* discovery bar.[5]

Judge Williams drew on the policies supporting qualified immunity to justify adoption of the clear-and-convincing-evidence standard for the motive element of constitutional tort claims. Pet. App. 16a-24a. Although "[c]onventional summary judgment principles supply some protection to defendants," he reasoned that, "[e]ven cut off from the

[4] In light of the bar on discovery regarding motivation and the higher standard of proof, Judge Williams' opinion eschewed application of a requirement of "heightened pleading" of unlawful motive. Pet. App. 12a, 22a; see also *id.* at 78a (opinion of Edwards, J.).

[5] See Pet. App. 13a-24a (opinion of Williams, J., joined by Sentelle, Buckley, and Henderson, JJ.); *id.* at 58a (concurring opinion of Ginsburg, J.) (agreeing with imposition of clear and convincing evidence standard, but not with discovery bar); *id.* at 44a-46a (concurring opinion of Silberman, J.) (favoring standard more demanding of plaintiffs).

fruit of depositions and other discovery against the defendant and her colleagues, plaintiff will often be able to depict a selective pattern of decisions that, without evidence of a more complete set of comparable ones, and extensive explanation by one or more decision-makers, will look fishy enough that a jury could reasonably find illicit motive by a preponderance." *Id.* at 16a-18a. Because "*Harlow* plainly view[ed] the costs of error in the grant or denial of relief in such cases as asymmetrical," Judge Williams reasoned that it is appropriate to value the "social costs of (1) litigating and (2) erroneously affording recovery" in some cases as greater than "the social costs of erroneously denying recovery" in others. *Id.* at 18a.

Judge Williams concluded that a bar against discovery into illicit motive is also warranted, because "[t]he primary burdens of litigation occur in discovery and trial." Pet. App. 13a. In view of the wide range of facts that may be relevant to motive, "[i]f the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive." *Ibid.*[6]

After setting forth the foregoing standards, Judge Williams noted that in this case the district court had dismissed petitioner's Fourth Amended Complaint, and that petitioner therefore had not yet moved for summary judgment. Pet. App. 25a. In view of the procedural history of the case to date, however, Judge Williams elected to

[6] Although Judge Williams would require a plaintiff, without the benefit of discovery, to provide "assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive," Pet. App. 13a, he would allow discovery on other issues, if warranted, including "discovery concerning a defendant official's state of mind for other purposes," *id.* at 15a.

consider whether affidavits embodying the assertions in petitioner's Fourth Amended Complaint could successfully withstand a motion by respondent for summary judgment on qualified immunity grounds. *Id.* at 25a-26a. He concluded that they could not, explaining that a jury could not find that petitioner's assertions constitute clear and convincing evidence of unconstitutional intent. *Id.* at 28a-34a. At the same time, Judge Williams made clear that, on remand, petitioner may attempt to bolster his evidence—perhaps in part through discovery, if he is able to conduct discovery in accordance with the standards set forth in Judge Ginsburg's separate opinion (discussed at pages 8-9, *infra*). Pet. App. 34a.

c. In his concurring opinion, Judge Silberman favored extending to all motive-based constitutional claims against government officials the more stringent test of *Halperin* v. *Kissinger*, 807 F.2d 180, 184-185 (D.C. Cir. 1986), which the court of appeals had developed for national security cases. Pet. App. 46a-57a. In Judge Silberman's view, "if the challenged defendants' actions, without regard to their actual intent, are consistent with an objectively reasonable intent, the defendants are entitled to immunity. And even if the defendants are not able to meet this burden, they are still entitled to immunity if they are able to prove that their actual motivation was legitimate." *Id.* at 50a.

d. Judge Ginsburg filed an opinion concurring in the adoption of a clear-and-convincing-evidence standard of proof of unconstitutional motive, Pet. App. 58a, but disagreeing with Judge Williams' *per se* bar against discovery into a defendant's motive, *id.* at 58a-64a. Judge Ginsburg explained that a complete bar on discovery before a district court rules on a motion for summary judgment would unjustifiably "require the plaintiff to obtain evidence without the ability to compel its production from those most likely to have it." *Id.* at 59a. Judge Ginsburg would, however, adopt a special discovery threshold, requiring a district court to grant a pre-discovery summary judgment motion asserting lack of unconstitutional motive "unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." *Id.* at 63a.

Judge Williams' opinion acknowledged that Judge Ginsburg's opinion was controlling on the discovery issue, as "the opinion consistent with the disposition on the narrowest grounds, i.e., a 'common denominator' of the reasoning of the majority." Pet. App. 34a (quoting *King* v. *Palmer*, 950 F.2d 771, 780-781 (D.C. Cir. 1991), cert. denied, 505 U.S. 1229 (1992)); but see *id.* at 79a (opinion of Edwards, J., concurring in the judgment to remand).[7]

e. Judge Henderson also wrote a concurring opinion, in which she "fully endorsed" the adoption of a clear-and-convincing-evidence standard, Pet. App. 72a,[8] but expressed her view that petitioner's claims are frivolous and should have been dismissed at the outset of the litigation under 28 U.S.C. 1915(d). Pet. App. 76a-77a.

f. Chief Judge Edwards (joined by Judges Wald, Randolph, Rogers, and Tatel) filed an opinion concurring in the judgment to remand the case. Pet. App. 78a. Chief Judge Edwards agreed with the court's abandonment of the heightened pleading and direct evidence rules, but

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[7] Like Judge Williams, Judge Ginsburg concluded that the facts that petitioner had alleged to date would not satisfy the clear-and-convincing-evidence standard. Pet. App. 71a.

[8] Judge Henderson did not comment on Judge Williams' proposed discovery bar or on Judge Ginsburg's heightened discovery threshold.

disagreed with the majority that alternative mechanisms should be adopted to protect public officials from the burdens of litigating the factual question whether they acted with unconstitutional motivation. *Id.* at 78a-79a. In his view, "[u]nder the principles enunciated in *Hobson* [v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)], plaintiffs can survive an initial motion for summary judgment, prior to discovery, by providing 'non-conclusory allegations of evidence' of the defendant's unconstitutional intent." *Id.* at 84a. If the plaintiff cannot specifically identify such evidence before discovery, "the trial judge may invoke Rule 56(f) and deny the summary judgment motion" based on the plaintiff's showing of "a reasonable likelihood that additional discovery will uncover evidence to buttress the claim." *Ibid.*

g. The en banc court vacated the dismissal of the First Amendment claim (and the pendent state claim) and ordered that the case be remanded following the panel's resolution of issues remaining between petitioner and the District of Columbia government. Pet. App. 34a, 64a, 71a, 78a.

6. The panel thereafter ruled on petitioner's claims against the District of Columbia government, and entered judgment remanding the case to the district court for further proceedings. Pet. App. 96a.[9]

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[9] Although the panel stated that "the *en banc* court has now disposed of the First Amendment retaliation claim," and referred to "the fact that Crawford-El's claims against Britton herself do not survive the heightened evidentiary burden imposed by the *en banc* court," Pet. App. 97a-98a, those comments must be understood to refer to the en banc court's conclusion that the First Amendment claim *as it now stands* would not survive, *id.* at 34a, 64a, 71a. In view of the en banc court's holding, *ibid.*, the panel's judgment that "the case is remanded" necessarily encompasses a remand of the First Amendment claim. *Id.* at 96a.

DISCUSSION

The United States agrees with the court of appeals that special protections are required to effectuate the purposes of qualified immunity where constitutional claims against public officials in their individual capacities turn upon whether the officials acted with unconstitutional motives. The protections of qualified immunity as developed in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and related cases would be rendered ineffective if a plaintiff could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991). Questions regarding precisely which protections strike an appropriate and workable balance between the need to protect public officials against unduly burdensome litigation, and the preservation of adequate remedies for and deterrence of unconstitutional conduct, see *Harlow*, 457 U.S. at 807, are important and recurring ones.

Certiorari should be denied here, however, because review would be premature and because, although he objects to the standards the court adopted, petitioner was the prevailing party in the court of appeals. The court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings on petitioner's First Amendment claim. The case has not even progressed to the summary judgment stage. This Court should decline to review the court of appeals' interlocutory decision in the abstract, before petitioner has had an opportunity to attempt to meet the new standards and the lower courts have definitively resolved

the validity of petitioner's First Amendment claim under those standards.

Moreover, although the specific approach taken by the court below differs from that of other circuits, most courts of appeals have agreed on the need for additional protections for public officials faced with motive-based constitutional claims. Evaluation of the available protections depends in part on how particular requirements operate in practice. Denying review here would give the District of Columbia Circuit a chance to implement its new standards, and the other courts of appeals the opportunity to consider them, before this Court takes up the issue.

1. The court of appeals in this case correctly concluded that established policies underlying the qualified immunity defense require special protections for public officials against the burdens of litigation based solely on assertions that their otherwise legitimate actions are unconstitutional because allegedly taken with unlawful intent. While this Court has held that 42 U.S.C. 1983 and the principles recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), authorize suits for damages against public officials in their individual capacities, the Court at the same time has been aware of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974); see *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992); *Harlow*, 457 U.S. at 807 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978)). This Court has developed the qualified immunity defense based upon a recognition of the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his

office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240.

Qualified immunity is intended to protect public officials not only from liability, but also from the burdens of litigation. *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991); *Wyatt*, 504 U.S. at 165-169; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). This Court has repeatedly recognized that, in order to realize the protection of immunity from suit, the entitlement to qualified immunity must be determined at the earliest stages of the litigation. See *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987); *Siegert*, 500 U.S. at 232. Indeed, where possible, until the "threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818; see *Creighton*, 483 U.S. at 647 n.6 (although in limited cases "discovery may be necessary," it must be "tailored specifically to the question of * * * qualified immunity").

The Court in *Harlow* reformulated qualified immunity in order to make it a more effective protection for public officials against the burdens of litigation and risks of liability on insubstantial claims. Before *Harlow*, public officials were entitled to qualified immunity from suit when they had "reasonable grounds for the belief [in the legality of their action] formed at the time and in light of all the circumstances, *coupled with good-faith belief*." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (emphasis added) (quoting *Scheuer*, 416 U.S. at 247-248). The Court in *Harlow* observed, however, that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [v. *Economou*, 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial," because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 815-816. As long as the official's

state of mind was an element of the immunity defense, the determination of whether the immunity was available required "[j]udicial inquiry into subjective motivation," *id.* at 817, often increasing rather than reducing a defendant's discovery and trial burdens. *Harlow* accordingly held that the availability of qualified immunity should turn not on the official's subjective "good faith," but on the objective, legal question whether the right asserted by the plaintiff was clearly established at the time of the action in question. *Id.* at 818.

Proof of state of mind is also, however, an element of many constitutional claims, including claims of unconstitutional discrimination, see *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (requirement of proof of discriminatory purpose), cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) (deliberate indifference), and, as in this case, adverse action allegedly based on the content of protected speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). Thus, although a state-of-mind inquiry is no longer part of the qualified immunity *defense* under *Harlow*, the objectively based immunity defense cannot prevent plaintiffs from pleading unconstitutional motive as an element of their own *claims*. See *Siegert*, 895 F.2d at 801 (citing *Hobson* v. *Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)). Because the law barring unconstitutionally motivated actions by government officials is likely to be clearly established,[10] virtually any otherwise legitimate adverse action by a public official can be alleged to violate clearly established law if it is further alleged that the action was taken for unconstitutional reasons. If an official faces the threat of suit any time his otherwise lawful actions can be

[10] See, *e.g.*, Pet. App. 26a-27a (concluding that petitioner alleged a violation of clearly established law).

misconstrued to have been improperly motivated, there is a danger that "his willingness to execute his office with decisiveness and the judgment required by the public good" will be undermined. *Scheuer*, 416 U.S. at 240. Claims of unconstitutionally motivated conduct therefore threaten the same interests that support the decision in *Harlow*.

We agree with the court of appeals that *Harlow* supports the adoption of additional measures, beyond the clearly-established-law rule, to protect public officials in the context of motive-based claims. This Court's grants of certiorari in two cases presenting issues closely related to those presented here, see *Kimberlin* v. *Quinlan*, 115 S. Ct. 2552 (1995); *Siegert* v. *Gilley*, 500 U.S. 226 (1991), underscore that these are issues of substantial importance. See Sup. Ct. R. 10(c).[11] The circuits are generally in accord regarding the need to prevent qualified immunity from being rendered illusory by allegations of unlawful motive.[12] There are, to be sure, a range of mechanisms that the Court may consider, and there are potentially significant variations among the existing standards.

[11] *Siegert* and *Kimberlin* were decided on other grounds, however, and the Court thus did not reach the questions presented in the petitions.

[12] See, *e.g.*, *Sheppard* v. *Beerman*, 94 F.3d 823 (2d Cir. 1996); *Blue* v. *Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995); *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (en banc); *Thompkins* v. *Vickers*, 26 F.3d 603, 607-608 (5th Cir. 1994); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990); *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992); *Bagby* v. *Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996); *Branch* v. *Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 648-649 (10th Cir. 1988).

Several circuits have held—and we agree—that facts supporting allegations of motive must be pleaded with heightened specificity.[13] In addition, before the en banc court, we argued that the requirement of heightened specificity applicable to the motive element should be supplemented with the requirement that "the specific facts pleaded establish a strong inference of improper motivation." U.S. En Banc Br. 27. Requiring allegations that are more particularized and more strongly indicative of unconstitutional motive raises the threshold of discovery. See Brief for the United States as Amicus Curiae at 24-25, *Kimberlin* v. *Quinlan*, *supra* (No. 93-2068); U.S. En Banc Br. 36-38. That important function also appears to be served by the requirement in Judge Ginsburg's opinion in this case that a plaintiff make a preliminary evidentiary showing of "a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." Pet. App. 63a. Additional protection should be provided at the summary judgment stage. In the court below, we advocated application of the "strong inference" standard on summary judgment, which would require the plaintiff to adduce evidence creating a strong inference of improper motivation in order to place the issue of motive genuinely in dispute.

The en banc court's clear-and-convincing-evidence requirement seeks to serve the same objectives of protecting public officials from the burdens of litigation and liability based on claims that their conduct was unconstitutionally

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[13] See, *e.g.*, *Schultea* v. *Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *Gooden*, 954 F.2d at 969-970; *Elliott*, 937 F.2d at 344-345; *Losavio*, 847 F.2d at 649; Brief for the United States as Amicus Curiae at 20-29, *Kimberlin* v. *Quinlan*, *supra* (No. 93-2068); Brief for the Respondent at 13-25, *Siegert* v. *Gilley*, *supra* (No. 90-96).

motivated. While we agree with the court of appeals that a more demanding standard is necessary, further development of the issues in the lower courts may help to clarify for this Court which mechanisms would best effectuate the purposes of *Harlow*, consistent with retaining avenues for effective remediation and deterrence of constitutional wrongdoing.

2. The petition for a writ of certiorari should be denied because it is premature. In view of the court of appeals' decision to remand the First Amendment claim at issue here, the decision below is interlocutory. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); see generally Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.18, at 195-198 (7th ed. 1993) ("[I]n the absence of some * * * unusual factor, the interlocutory nature of a lower court judgment will result in a denial of certiorari.").

Although we agree with the en banc court that petitioner's prospects of ultimate success on his First Amendment claim are dim, see Pet. App. 34a, 64a, 71a, it remains an open question what evidence he will adduce and whether the district court or the court of appeals will find that it meets the new standards. Respondent has not moved for summary judgment on qualified immunity grounds, and petitioner has not filed a response to any such motion. It thus cannot yet be determined whether any evidence that petitioner might present—whether in opposition to

summary judgment, or as a basis for seeking discovery—would suffice.

There are especially strong reasons to deny interlocutory review here, given that, following the district court's dismissal of his First Amendment claim, petitioner succeeded on appeal in obtaining a reversal and a remand for further proceedings. The petition thus challenges not the judgment of the court of appeals—which favored petitioner—but the court's articulation of the standard to be applied on remand in ruling on a summary judgment motion that has not yet even been filed. This Court, however, "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see also *Texas* v. *Hopwood*, 116 S. Ct. 2581 (1996) (opinion of Ginsburg, J., respecting the denial of certiorari). The Court should "await a final judgment on a [claim] genuinely in controversy before addressing the important question[s] raised in this petition." *Id.* at 2581.

Denying review may have the added benefit of affording the court below an opportunity further to explain how its new standards should be applied in practice. For example, the distinction between the heightened discovery threshold set forth in Judge Ginsburg's separate opinion and the ordinary operation of Federal Rule of Civil Procedure 56(f), see Pet. App. 84a (opinion of Edwards, J.), may be clarified in the context of plaintiffs' concrete efforts to meet the new standard. The types and quantum of evidence of unconstitutional motive needed to meet the clear-and-convincing-evidence standard may also be illustrated in practice. Moreover, although Judge Williams' opinion purported to abandon the court of appeals' former "heightened pleading" rule as unnecessary in view of the discovery bar he outlined, *id.* at 12a, 22a; see also *id.* at 78a (opinion of Edwards, J.), a majority of the en banc court did

not support a *per se* discovery bar. As a result, the status of "heightened pleading" in the District of Columbia Circuit remains uncertain, and further decisions by that court may clarify that important question.

3. Although no other court of appeals has adopted the clear-and-convincing-evidence standard or the heightened discovery threshold the court of appeals announced in this case, that circumstance does not counsel in favor of certiorari here. The en banc court's decision makes significant innovations that promise to advance the debate over the appropriate qualified immunity protections for public officials faced with burdensome litigation concerning questions of intent. There has been little opportunity for other courts of appeals to respond to those innovations. But see *Grant* v. *City of Pittsburgh*, 98 F.3d 116 (3d Cir. 1996).[14] In light of the widespread view among the circuits regarding the need for some measures to alleviate

[14] In *Grant*, which was briefed and argued before the en banc court's decision here, the Third Circuit first held that the district court had failed on other grounds to justify its denial of qualified immunity. 98 F.3d at 121-123. It next held, consistent with the decision below, that *Harlow* does not altogether bar consideration of evidence of subjective intent where impermissible intent is an essential element of the constitutional claim. *Id.* at 123-125. Finally, the court addressed an argument in favor of "some sort of 'heightened' procedural burden" at the summary judgment stage. *Id.* at 125-126. Although the Third Circuit referred to the decision below in passing, *id.* at 125, and declined to adopt a heightened summary judgment standard, *id.* at 126, it did not discuss the extensive treatment of the competing considerations bearing on that issue in the various opinions below. Nor did the Third Circuit address at all whether there should be a heightened threshold for discovery, along the lines set forth in Judge Ginsburg's separate opinion. Because a summary judgment motion has not yet been filed in this case, the divergence between the discussion of the summary judgment issue in the opinions below and in the Third Circuit's decision in *Grant* does not render this case a suitable vehicle for review of the summary judgment issue.

the vexing burdens that intent-based claims impose on public officials, the newness of the court of appeals' particular approach, the interlocutory posture of this case, and the likely benefit of further development of the law in the courts of appeals, review is not warranted at this time.[15]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

MAY 1997

---

[15] The direct evidence rule at issue in the *Kimberlin* and *Siegert* petitions created not only an express circuit conflict, but a conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954). See *Siegert*, 500 U.S. at 235-236 (Kennedy, J., concurring). No such conflict is presented by the petition in this case.

(5)

No. 96-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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GAFFNEY & SCHEMBER, P.C.
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Washington, D.C. 20009
(202) 328-2244
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OFFICE OF THE
CORPORATION COUNSEL
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Washington, D.C. • THIEL PRESS • (202) 328-3286

PETITION FOR CERTIORARI FILED NOV. 25, 1996
CERTIORARI GRANTED JUNE 16, 1997

75 pp

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*The Fourth Amended Complaint, which petitioner maintains is the only relevant pleading, appears in the Appendix to Petition for a Writ of Certiorari. Pet. App. 172a. The opinions below and the judgment under review also appear in that appendix. Pet. App. 1a-106a, 110a-141a, 145a-167a (opinions below); Pet. App. 1a (judgment under review).

APPENDIX A

EXCERPTS FROM DOCKET ENTRIES

U.S. District Court for the District of Columbia (Case #89-CV-3076):

* * *

11/09/89 1 COMPLAINT filed, attachments [Entry date 11/13/89]

* * *

04/10/90 13 REQUEST by plaintiff LEONARD ROLLON CRAWFORD-EL to defendant PATRICIA BRITTON, defendant DC DEPT. OF CORR. for production of documents [Entry date 04/11/90]

04/10/90 14 INTERROGATORIES filed by plaintiff LEONARD ROLLON CRAWFORD-EL to defendant PATRICIA BRITTON, defendant DC DEPT. OF CORR. [Entry date 04/11/90]

* * *

05/01/90 16 MOTION by defendant PATRICIA BRITTON, defendant DC DEPT. OF CORR. to dismiss Exhibit (2) [Entry date 05/02/90]

* * *

05/07/90 22 MOTION by plaintiff LEONARD ROLLON CRAWFORD-EL to amend complaint [1-1] (fiat, LAMBERTH, J.) [Entry date 05/08/90]

* * *

05/10/90 23 ORDER by Judge Royce C. Lamberth : granting with regard to defendant DC, denying with regard to defendant BRITTON motion to dismiss [16-1] status hearing set for 9:30 5/25/90; defendant BRITTON to file any written discovery requests by 5/24/90; response by defendant BRITTON to plaintiff's outstanding discovery request due 5/17/90; (N) [Entry date 05/15/90]

05/17/90 24 MOTION by defendant PATRICIA BRITTON for reconsideration of Order of 5/1/0/90 Attachment [Entry date 05/18/90]

05/23/90 25 RESPONSE by plaintiff LEONARD ROLLON CRAWFORD-EL in opposition to motion for reconsideration of Order of 5/1/0/90 [24-1] by PATRICIA BRITTON. Attachment [Entry date 06/07/90]

08/31/90 26 ORDER by Judge Royce C. Lamberth : granting motion for reconsideration of Order of 5/1/0/90 [24-1] by PATRICIA BRITTON; plaintiff given 20 days to amend his complaint (N) [Entry date 09/06/90]

* * *

12/21/90 37 ORDER by Judge Royce C. Lamberth; directing that plaintiff shall remain at the D.C. Jail until further order; Assistant Corporation Counsel Marty to file a report no later than January 2, 1991, regarding plaintiff's use of the law library, shall remain at the D.C. (N)

* * *

United States Court of Appeals for the District of Columbia Circuit (No. 91-7023):

* * *

12/27/91 – Opinion for the Court of Appeals filed by Judge Williams (interlocutory appeal, No. 91-7023)

* * *

U.S. District Court for the District of Columbia (Case No. 89-CV-3076):

* * *

08/24/92 85 RESPONSE by plaintiff(s) LEONARD ROLLON CRAWFORD-EL in opposition to motion to dismiss the Fourth Amended Complaint [84-1] by DISTRICT OF COLUMBIA, PATRICIA BRITTON; attachments (2) [Entry date 08/25/92]

* * *

02/15/94 88 MEMORANDUM OPINION by Judge Royce C. Lamberth (N) [Entry date 02/16/94]

02/15/89 89 ORDER by Judge Royce C. Lamberth : granting motion to dismiss the Fourth Amended Complaint [84-1] by PATRICIA BRITTON, DC, dismissing the federal claims of plaintiff's fourth amended complaint, both as against defendant Patricia Britton and against the District of Columbia, dismissing plaintiff's District of Columbia law claim for lack of jurisdiction. (N) [Entry date 02/16/94]

* * *

08/31/94 96 MEMORANDUM OPINION AND ORDER by Judge Royce C. Lamberth: denying motion for reconsideration of the order entered 02/15/94 [90-1] by LEONARD ROLLON CRAWFORD-EL [Entry date 09/01/94]

* * *

United States Court of Appeals for the District of Columbia Circuit (Case No. 94-7203):

* * *

8/27/96 IN BANC OPINION (30 pgs) for the Court filed by Judge Williams, CONCURRING OPINION (19 pgs) filed by Judge Silberman, CONCURRING OPINION (12 pgs) filed by Judge Ginsburg, CONCURRING OPINION (5 pgs) filed by Judge Henderson, CONCURRING IN THE JUDGMENT TO REMAND OPINION (15 pgs) filed by Judge Edwards with whom Wald, Randolph, Rogers and Tatel, concur. [94-7203]

8/28/96 JUDGMENT (w memo) to remand case to the USDC [220310-1]. Before Judges Edwards, Wald, Randolph. [94-7203]

* * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 89-3076

(To be supplied by the Clerk of the District Court.)

[8 NOV 89 – Leave to file without prepayment of costs - granted. /s/ M. Pratt, United States District Judge]

Leonard Rollon Crawford EL
Fed. Reg. #00936-007
P.M.B. 7007, Creek-B
Marianna, Florida 32446
(Enter above your full name, prison number and address)

vs.

(1) Patricia Britton, 1923 Vermont Ave., N.W., Washington, D.C. 20001
District of Columbia Government
(2) District of Col. Dept. of Corrections
1923 Vermont Ave, N.W., Wash. D.C. 20001
(Enter above the full name and address(es), if known, of defendant(s), in this action.)

[HARRIS, J. SSH]

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

Instructions for filing a Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. Section 1983

This packet contains one copy of a complaint form and one copy of a forma pauperis petition. To start an action, you must file an original and one copy for the Court and one copy for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. *All copies of the complaint must be identical to the original.*

The clerk will not file your complaint if these instructions and these forms are not used.

Your complaint must be clearly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use another blank page.

Your complaint can be brought in this Court only if one or more of the named defendants is located within the District of Columbia. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or problem.

In order for this complaint to be filed, it must be accompanied by the filing fee of $120.00. In addition, you must serve a copy of the complaint on each of the defendants in any of the ways provided for in Rule 4, Federal Rules of Civil Procedure.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed

in forma pauperis. One blank petition for this purpose is included in this packet. This petition should be filed with your complaint.

The law requires that you state only facts in your complaint. COMPLAINTS CONTAINING LEGAL ARGUMENTS OR CITATIONS WILL NOT BE FILED.

When these forms are completed, mail the original and the required copies to the Clerk of the United States District Court for the District of Columbia, Third Street and Constitution Ave., N.W., Room 1825, Washington, DC 20001.

I. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in state or federal court dealing with the same or similar facts involved in this action? Yes ( ) No (XX)

B. Have you begun other lawsuits in state or federal court relating to your imprisonment? Yes (XX) No. ( )

C. If your answer to A or B is Yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

   Plaintiffs: Leonard Rollon Crawford EL, P.M.B. 70007, Creek-B, Marianna, Florida 32446

   Defendants: Dr. Dugdale MD., et., al., P.O. Box 900, Steilacoom, Washington 98388

2. Court (if federal court, name the district; if state court, name the county): United States District Court for the Western District of Washington at Seattle 98104

3. Docket Number: C-89-360 TB
4. Name of judge to whom case was assigned: Unknown
5. Disposition (for example: was the case dismissed? Was it appealed? Is it still pending?) Pending
6. Approximate date of filing lawsuit: July 19, 1989
7. Approximate date of disposition: Unknown

II. PLACE OF PRESENT CONFINEMENT: Federal Correctional Institute, P.M.B. 7007, Marianna, Florida 32446

A. Is there a prisoner grievance procedure in this institution? Yes (XX) No ( ) If your answer is Yes, go to Question II B. If your answer is No, skip Question II B, C and D and go to Question II E.

B. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes (XXX) No ( )

C. If your answer is Yes to Question II B

1. To whom and when did you complain? Unit Counselor
2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one). Not Necessary Here an inmate can visit his counselor.
3. What, if any response, did you receive? (Furnish copy of response if in writing). Counselor advised me to contact D.C. Department of Corrections because I am allowed both my property and all legal material relevant to current cases.

4. What happened as a result of your complaint? I wrote to Mr. Walter B. Ridley, Director D.C. Dept. of Corr. & Patricia Britton Coor. Sp. Proj. informing them of this and requesting that my legal materials and property be recovered and mailed to me here both on my own and with the assistance of two attorneys.

D. If your answer is No to Question II B, explain why not. _____

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes ( ) No ( )

F. If your answer is Yes to Question II E,

1. To whom and when did you complain?

_____

2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one).

_____

3. What, if any response, did you receive? (Furnish copy of response if in writing). _____

_____

4. What happened as a result of your complaint?

_____

III. PARTIES

(In item A below, place your name and prison number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: Leonard Rollon Crawford EL
Address: P.M.B. 7007, Marianna, Florida 32446

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

B. Defendant: Patricia Britton is employed as Coordinator Special Projects at D.C. Department of Corrections, 1923 Vermont Avenue, N.W., Washington, D.C. 20001

C. Additional Defendants:
The District of Columbia Department of Corrections.
The District of Columbia Government
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

IV. STATEMENT OF CLAIM

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach extra sheets if necessary.)

I, Leonard Rollon Crawford EL, Plaintiff Pro se, a lifetime resident of the District of Columbia, presently incarcerated and sentenced under the D.C. Code being held as a D.C. Boarder Inmate at the Federal Correctional Institute located P.M.B. 7007, Marianna, Florida 32446, do hereby present this claim.

Defendant Patricia Britton is not believed to be a resident of the District of Columbia but her principal place of business is located within the District of Columbia

and these alleged acts occured within the District of Columbia. Defendant Patricia Brittons principal place of business is at the District of Columbia's Department of Corrections Headquarters located at 1923 Vermont Avenue, N.W., Washington, D.C. 20001.

Defendant, The District of Columbia Department of Corrections is an agency of the District of Columbia Government and employes defendant Britton in her official capacity. The D.C. Department of Corrections is responsible for the actions of it's employees committed while acting in their offical capacity within their employment.

FACTS

Plaintiff, Leonard R. Crawford EL, was transfered from the Maximum Security Facility at Lorton, Va., on December 14, 1988, to the Spokane County Jail in Spokane County, Washington due to overcrowding at the Lorton Facility. On February 2, 1989, plaintiff was transfered to the Washington State Prison System at McNeil Island Correctional Center located P.O. Box 1000, Steilacoom, Wa. 98388. Plaintiff and other D.C. Inmates were to be housed there for a period of a year.

On July 28, 1989, plaintiff was informed by Washington State Prison Officials that all D.C. Prisoners would be returning to Lorton. He was required to carry his property to the property room for boxing to be shipped to him once he reached his destination and requested it in writing to be mailed to him.

On August 9, 1989, plaintiff left the Washington State Prison System supposedly for the return to Lorton, Va. However Plaintiff was flown to the Western Missouri Correctional Center in Cameron, Missouri 64429. One

week later on August 18, 1989, a contingency of D.C. Correction Officers led by defendant Patricia Britton arrived at WMCC to transport plaintiff and other D.C. Prisoners back to Lorton. Before leaving plaintiff spoke directly with defendant Britton regarding his three boxes of personal property and explained his concern due to the large volume of legal material contained therein relevant to current case of his in various courts. Defendant Patricia Britton informed the plaintiff that the reason his property was not sent to him was due to her prior knowledge that he would be in Missouri only a week. She further stated that she had contacted the Washington State Prison Officials and requested that they mail all the D.C. Prisoners Property to her at 1923 Vermont Avenue, N.W., Washington, D.C. 20001 and that they not mail it directly to the inmates at their destinations. She then informed plaintiff that once he reached Lorton his property would be given to him.

On August 19, 1989, plaintiff arrived at the Lorton Maximum Security Facility in Lorton, Va. Fearing that his property would be delayed and thereby cause him not to be able to respond to the Courts or to be able to provide his attorneys with information to assist him he wrote to defendant Britton informing her that he'd been informed that his property had not arrived. Plaintiff further requested that his property be sent to him immediately when it arrived. Plaintiff then wrote to Mr. Walter B. Ridley Director of D.C. Department of Corrections when he noticed other inmates who had returned back from Washington State were receiving their property but he'd not received his. Plaintiff wrote to the Secretary for the District of Columbia.

After plaitiff wrote inquiring about his property he was immediately transfered again on September 7, 1989,

to the Federal Bureau of Prisons, F.C.I. Petersburg, Va. While at F.C.I. Petersburg, Va. Plaintiff learned that defendant Britton had contaced plaintiff's brother in law, Mr. Jesse Carter, who does work at the D.C. Department of Corrections and is employed by the D.C. Government and cajoled him into picking up all of Plaintiff's property including all of his necessary legal materials. Plaintiff spoke to Mr. Carter who informed him that defendant Patricia Britton called him and stated that she had spoke with plaintiff and that plaintiff was very concerned about his property and it's legal content. Further that she was afraid that it would get lost between her office and being sent to the Lorton Property Officer to be mailed to plaintiff so would he please do her a favor and pick it up and keep it for plaintiff.

Prior to leaving Lorton's Maximum Security Facility for F.C.I. Petersburg, Va., plaintiff spoke with Property Officer Cpl. R. Ward about his property. Cpl. Ward informed plaintiff that he could not take any property with him to Petersburg, Va., because the Bureau of Prisons would not accept property while an inmate was in transit to his final destination. He then informed plaintiff and the other D.C. Prisoners also being sent to Petersburg, Va. that if they wanted their property sent to him to write him a letter once they reaced their final B.O.P. Destination and it would be mailed immediately to them. Cpl. Ward further stated that if you did not want your property to follow you you must sign a form authorizing the D.C. Department of Corrections to release your property to a person of your personal designation. *Plaintiff did not sign a release authorization form for his property to be given to anyone because he wanted it mailed directly to him for the material was personal and confidential and pertained to his current criminal appeal*

and civil pleadings. It also contained several hundred dollars worth of recently purchased clothing and personal articles.

Plaintiff's first attempt to resolve this matter informally was to request that the unopened boxes of his property be returned to defendant Britton so it could be sent to Lorton's property officer and mailed to him. Mr. Jesse Carter went to see defendant Britton and explained that plaintiff had spoke to him informing him that it was not his wish for him to receive his property and that he would return it to her office. Defendant Britton informed Mr. Carter that she did not see why plaintiff was making such a big fuss about his property because as far as she was concerned plaintiff should be happy she did not throw it in the trash.

Plaintiff contacted his criminal appeal attorney, Mr. Steven Weinberg, Esq., 2141 P St., N.W., Washington, D.C. 20037 and asked him to intervene. Defendant Britton led him to believe that she had been authorized to release defendants property and refused to consider the matter further. Plaintiff next contacted Mr. Robert C. Hauhart, Supervising Attorney for the D.C. Public Defenders Office of Prisoners Rights Program. Def. Britton made no rational statements that would advance her position. Mr. Hauhart then contacted Mr. Paul Quander, Esq., D.C. Corporation Counsel and asked him to intercede. The problem was still not resolved. Mr. Hauhart next wrote to Mr. Arthur Graves, Associate Director for the D.C. Department of Corrections to resolve the issue and no answer was forthcoming. Plaintiff also enlisted the aid of Mr. Jay Alexander, Esq. 2555 M St. N.W., who currently represents plaintiff on a civil matter involving Defendant Patricia Britton and other employees of the D.C. Department of Corrections for violations of plaintiff's civil rights in another matter.

CAUSES

Defendant Patricia Britton as an individual and in her official capacity willfully and intentionally deprived plaintiff of his personal property and legal materials with the intention of preventing him access to the courts. Defendant Patricia Britton as an individual and in her official capacity acted in a conspiracy to deprive plaintiff of his right to adequate representation of counsel through the cajolery of her actions and involvement of others. By denying plaintiff his property and legal materials she sought to make it impossible for plaintiff to assist his attorneys in representing him.

Defendant The District of Columbia Department of Corrections acted willfully to conspire with defendant Patricia Britton to deprive plaintoff of his rights to access to the Courts and Adequate Representation of Counsel after having received many requests to resolve this issue received by it's officials.

The legal material and personal property of plaintiff was the sum total of seven years of his life in prison. All of it accumulated over years in prison and none of it prohibited contraband. By releasing plaintiff's property without authorization defendants Britton and the D.C. Department of Correction's knew that plaintiff would suffer a great loss because while his property could have been sent to him once he reached his final B.O.P. destination by the D.C. Department of Corrections it can not be mailed to him there by a family member. Thus defendant Patricia Britton and Defendant D.C. Department of Corrections intentionally subjected plaintiff to both cruel and unusual punishment and denied him equal protection under the law.

The District of Columbia Government shares in defendants responsibility for their actions due to the efforts

made by attorneys representing plaintiff to resolve the matter directed to it's officials namely Paul Quander, Esq., Walter B. Ridley-Director DCDC, Arthur Graves-Associate Director DCDC and Mr. Robert Reeder DCDC and Patricia Britton DCDC.

There is no government interest at stake that would outweigh plaintiff's rights.

V. RELIEF

(State briefly exactly what you want the Court to do for you. Make no legal arguments. Cite no cases or statutes.)

WHEREFORE, the premises considered, the Plaintiff demands judgement against the defendants both in their individual and official capacity in the amount of TWO HUNDRED AND FIFTY THOUSAND DOLLARS PUNITIVE DAMAGES and TWO HUNDRED AND FIFTY THOUSAND DOLLARS COMPENSATORY DAMAGES.

Plaintiff DEMANDS TRIAL BY JURY.

Signed this 24 day of October , 19 89.

/s/ Leonard R. Crawford El
(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

10/24/89 /s/ Leonard R. Crawford El
(Date) (Signature of Plaintiff)

PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
451 Indiana Avenue, N.W.
Washington, D.C. 20001

September 28, 1989

Paul Quander, Esq.
Assistant Corporation Counsel
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Room N-102
Washington, D.C. 20001

Re: Kenneth Ward
01429-000, FCI Petersburg
DCDC 184-542

Leonard Crawford
00836-007, FCI Petersburg
DCDC 176-323

Dear Paul,

I am writing on behalf of and in reference to Messrs. Ward and Crawford. Both have contacted me with reference to the actions of Department officials in depriving them of their personal and legal property upon return from Washington State.

Specifically, both Mr. Ward and Mr. Crawford have advised me they have requested the appropriate Department official, Ms. Britton, to make their legal property available to them at their present location, and direct their personal property – all of it accumulated over years in prison and none of it prohibited contraband – to them either now or upon final designation. It is my

understanding from letters and conversations with my clients, and conversations and correspondence with Jay Alexander, Esq., Miller Cassidy, Larroca, and Lewin, that Ms. Britton has declined to provide Mr. Ward and Mr. Crawford, and others in similar circumstances, with their legal materials, and has refused to forward their personal property. From my understanding of the reasons given for these decisions, there is no government interest at stake that would outweigh my clients' rights to their legal and personal property, and, indeed, no rational basis has been advanced by Ms. Britton that can withstand any level of scrutiny. Therefore, I strongly urge you to administratively reverse the decisions that are presently governing control and disposition of these individuals legal and personal property.

Due to the gravity of this matter, and the high likelihood of litigation to resolve this issue if the Department refuses to alter its present policy and course of behavior, I must ask you to provide me your answer in writing within ten (10) days of the date of my letter.

Very truly yours,

/s/ Robert C. Hauhart
Robert C. Hauhart
Supervising Attorney

RCH:dsr
cc: Kenneth Ward
Leonard Crawford
Jay Alexander, Esq.

Mr. Leonard R. Crawford EL
Fed. Reg. #00936-007
F.C.I. Marianna
100 F.C.I. Road, PMB 7007
Marianna, Florida 32446

September 28, 1989

Mr. Walter B. Ridley
Director D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Ridley,

When I returned from the McNeil Island Correctional Center in Steilacoom, Washington, I wrote you regarding my personal property along with writing Patricia Britton - Coordinator Special Projects. In my letters I explained clearly to you that I wanted my property sent to me directly due to the contents of that property and its relevance to my ongoing current legal cases in the courts. Both you and Patricia Britton ignored these letters contents.

Before leaving Lorton's Maximum Security Facility I informed Cpl. Ward the property officer there that I knew the Federal Bureau of Prions does not accept property while in transit or a holdover and would therefore request that my property be mailed to me upon reaching my destination. I left Lorton on September 7, 1989 and arrived here at my destination on September 25, 1989.

Since I left I now am given to understand that something has gone amiss with my property. I was never notified that my property had arrived, I was not consulted about what I wanted to do with it, I did not sign a

Property Release Authorization Form and all of this has occured in less than a thirty day period.

Therefore I am respectfully requesting that you have your underling Patricia Britton locate, recover and mail my boxes of property to me here at F.C.I. Marianna. The property Officer here has explained that I may keep all of the property contained therein that is approved for this F.C.I. Nearly all of the property I have in those boxes will be accepted and that which is not I am informed will be mailed to the person of my designation.

Sincerely

/s/ Leonard R. Crawford EL
Leonard R. Crawford EL

cc: Attorney

PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
451 Indiana Avenue, N.W.
Washington, D.C. 20001

October 10, 1989

Mr. Arthur Graves
Associate Director
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Room N-102
Washington, D.C. 20001

Re: Kenneth Ward
01429-000, FCI Petersburg
DCDC 184-542

Leonard Crawford
00836-007, FCI Petersburg
DCDC 176-323

Dear Mr. Graves:

On October 6, 1989, I spoke with Mr. Reeder of your office regarding property of the above two residents. Earlier I had set forth my concerns in a letter to Paul Quander. Mr. Reeder suggested I forward a copy of that letter to you.

Mr. Reeder stated that to the best of his knowledge residents returning from Washington State would have their property forwarded by the Department to their final BOP destination. This is the goal I seek on behalf of Mr. Crawford and Mr. Ward, as my letter to Mr. Quander makes clear. I assume this constitutes a reversal of the policies being pursued by Ms. Britton which were the source of my complaint. Please advise me at your

convenience if Mr. Reeder is correct so I may advise my clients of the policy the Department contends to follow.

Very truly yours,

/s/ Robert C. Hauhart
Robert C. Hauhart
Supervising Attorney

RCH:dsr
Enclosure
cc: Kenneth Ward
Leonard Crawford

Mr. Leonard R. Crawford EL
Fed. Reg. NO. 00936-007
F.C.I. Marianna
P.M.B. 7007
Marianna, Florida 32446

October 18, 1989

D.C. Corporation Counsel
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

Dear Counsel,

I am writing your office in an effort to resolve a matter in dispute between myself and the D.C. Department of Corrections for the loss of my personal property and violations of my constitutional rights. The property itself has not disappeared but it was itentionally released without authorization by Patricia Britton to prevent me from having access to the courts by removing all of my legal records from my possession.

Patricia Britton is Coordinator for Special Projects for the D.C. Department of Corrections and is involved in the transfer of D.C. Inmates. She is also one of several persons being named in a suit by the D.C. Inmates who were transfered to the Spokane County Jail in December 1988. On August 9, 1989 I was transfered from the Washington State Prison System to Missouri. On the 18th Ms. Britton and D.C. Corrections Officers came to Missouri to transfer D.C. prisoners back to Lorton Prison. At that time I questioned her regarding the whereabouts of my property. She informed me that she asked Washington State not to follow normal procedures which is mailing it directly to the inmate but to instead mail it to her at 1923 Vermont Avenue, N.W., D.C. She further

assured me that my property would be given to me at Lorton. Upon arrival at Lorton this was not done and I wrote her and the director urging them to send it directly to me due to the large volume of legal material contained therein relevant to current pending civil and criminal appeals and cases.

I was transfered from Lorton to the Federal Bureau of Prisons on September 7, 1989. Two weeks later I was informed that Ms. Britton had misled my sisters husband who worked for the D.C. Government and Department of Corrections into believing that I wanted her to give my property to him. I did not want him nor anyone else to pick it up but instead for it to be mailed to me here.

When I attempted to resolve this informally through my attorney Ms. Britton stated that she would not recover the three boxes of property and mail them to me here at Marianna F.C.I. She further claimed that the Federal Bureau of Prisons would not accept the property of D.C. Inmates. I spoke with several officials of the Federa. B.O.P. and all informed me that while the B.O.P. does not accept an inmates property while in transit or in holdover status, the inmates property may be mailed to him when he reaches his destination.

The D.C. Department of Corrections policy requires that when an inmates property is released whether it be to his wife, mother, father, etc., that the inmate be required to sign a witnessed Property Release Form authorizing the release of the property to the party designated on the form. Patricia Britton argues now that she had strict orders from the Director Mr. Walter B. Ridley to dispose of the property within 30 days. Even so if that were true I left Lorton on September 7, 1989, and according to officials at the prison my property had not reached the D.C. Department of Corrections. I arrived

at my final destination on September 25, 1989. Given the benefit of doubt that my property did not reach the D.C. Department of Corrections until exactly the 7th, the time between the 7th and my arrival of the 25th is less than a 30 day period.

I would hope that your office could convince the D.C. Department of Corrections to have the property belonging to me returned to them and then mail it to me under seal of the D.C. Department of Corrections here. If this can not be accomplished within the next two weeks then I will file suit. The Federal Bureau of Prisons will not accept property from an inmates family. Therefore Mr. Britton knew that she was effectively causing me the loss of the property and preventing me from addressing the courts as well as in assisting my attorneys to adequately represent me.

Your response is awaited and hopefully this matter will be resolved in the next two weeks. Enclosed you will find a copy of my notice of intent to file suit and a letter to Mr. Walter B. Ridley, Director D.C.D.C.

Sincerely

/s/ Leonard R. Crawford EL
Leonard R. Crawford EL

cc: Mr. Robert Hauhart, Atty
Mr. Jay Alexander, Atty

STEINMETZ, WEINBERG & MOATS
2141 P Street, N.W., Suite 103
Washington, D.C. 20037

October 12, 1989

Mr. Leonard Crawford EL
Fed. Reg. #00936-007
P.M.B. 7007
Marianna, Florida 32446

Re: Crawford v. U.S.

Dear Leonard:

I'm sorry to hear about the difficulties you have encountered recovering your property and the loss of your files.

In reference to the cost of replacing your entire file concerning your arrest, trial, conviction and appeal, I would estimate that the cost would be approximately $500.00.

If you need any further information, please let me know.

Very truly yours,

/s/ Steven Weinberg
Steven Weinberg

STEINMETZ, WEINBERG & MOATS
2141 P Street, N.W., Suite 103
Washington, D.C. 20037

September 26, 1989

Mr. Leonard Crawford EL
#00936-007
P.O. Box 1000
Petersburg, Virginia 23804-1000

Re: Crawford v. U.S.

Dear Leonard:

I spoke with Robert Hauhart yesterday and he informed me that he is writing you a letter in response to your letter to him, explaining that the D.C. City Council passed legislation which has closed the "loophole" uncovered by Judge Green, thereby preventing you from benefitting from her decision.

Today I spoke with Pamela Britton, who informed me that your family picked up your property last week.

I will let you know about any progress on your appeal. I am currently waiting for the transcript from the 23-110 hearing to be completed.

If you have any questions, please let me know.

Very truly yours,

/s/ Steven Weinberg
Steven Weinberg

Enc.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 89-3076 (RCL)

April 6, 1990

LEONARD R. CRAWFORD EL
Plaintiff Pro Se

v.

PATRICIA BRITTON, et al.,
Defendants.

REQUEST FOR PRODUCTION OF DOCUMENTS ETCs UNDER RULE 34 FED. RULES CIVIL PROCEDURE

Plaintiff Leonard R. Crawford El, Pro Se, requests defendants respond within 30 days to the following requests.

1. The contract between the District of Columbia, D.C. Department of Corrections and the Washington State Prison System and between the District of Columbia and the D.C. Department of Corrections and the Western Missouri Correctional Center and the agreement between the D.C. Department of Corrections and the Federal Bureau of Prisons regarding the housing of D.C. Code offenders in effect between 1988 and up to and including 1990.
2. All records, reports, progress reports and communications between any official in the D.C. Department

of Corrections in reference to Plaintiff, to officials in the Washington State Prison System, Western Missouri Correctional Center and the Federal Bureau of Prisons or any of its Agencies.

3. D.C. Department of Corrections Rules, Regulations and policy regarding the handling of inmates property, legal material, etc.
4. D.C. Department of Corrections Rules, policy or Regulations defining an inmates immediate family members.
5. All letters, memos, correspondance received concerning Plaintiffs property and legal material from Plaintiff or Plaintiffs representatives and responses thereto.
6. D.C. Department of Corrections property release authorization form in effect between August 19, 1989 and September 7, 1990.
7. Job descriptions of all positions held or previously held by Defendant Britton during her employment with the D.C. Department of Corrections.
8. All lawsuits or pleadings received naming Defendant Patricia Britton as a defendant or party thereto.
9. All records of Defendant Patricia Brittons employment with the D.C. Department of Corrections.
10. Description of all training Defendant Britton has received in connection with her employment with the D.C. Department of Corrections.
11. All inmate complaints or grievances filed against Defendant Britton during her employment with the D.C. Department of Corrections.
12. Government bill of lading or frieght records regarding shipping and receipt of Plaintiffs property from Washington State to D.C. Department of Corrections.

13. All persons names involved in the processing of Plaintiffs present claims working in the D.C. Department of Corrections including consultants on legal or constitutional issues.
14. Form(s) authorizing Patricia Britton to release Plaintiffs property to Jesse Carter without Plaintiffs consent.

/s/ Leonard R. Crawford El
Leonard R. Crawford El
Plaintiff Pro Se
1901 D St SE (SE-2)
Washington, D.C. 20003
176-323

[Certificate of Service Omitted In Printing]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 89-3076 (RCL)

April 6, 1990

LEONARD R. CRAWFORD EL
Plaintiff Pro Se

v.

PATRICIA BRITTON, et al.,
Defendants

PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANT PATRICIA BRITTON, et al.

Pursuant to Rule 33 Fed. Rules Civil Procedure Plaintiff, Leonard Rollon Crawford-El Pro Se request that defendant Patricia Britton respond within 30 days to the following interrogatories:

1. What is your full name, date of birth, place of birth, age, social security no., marital status and number of children?
2. Where do you presently reside and what were your addresses for the past ten (10) years?
3. What schools, colleges, or universities have you attended and what are the dates which you attended each and the diploma, certificate or degree obtained and the date obtained from each?

4. What is your current occupation and what are the duties and responsibilities of your current occupation?
5. What other jobs, employment or occupation have you held for the past ten years, length of time working at each and reason for changing employment?
6. What courses or studies have you completed in connection with your current and past jobs, employment or occupations?
7. Have you ever been arrested and/or convicted of a violation of the law whether felony, misdemeanor or traffic violation?
8. Have you ever been sued before in either your individual or official capacity in connection with your employment and if so state the name of the court, case number, disposition or status and cause of action bought against you and any other party to the suit?
9. Have you ever been reprimanded or transfered in connection with any implication of wrong doing or inappropriate action on your part while performing the duties and responsibilities of your job or office and if so list each and the dates of occurance?
10. Were you working as a classification officer at the Lorton Occoquan facilities in 1985 and 1986?
11. When was the first time you interviewed, spoke with, treated or assisted in treating plaintiff in a professional capacity in 1985 or 1986?
12. Did there ever come a time in 1985 and 1986 when you admonished Plaintiff for having attorneys and news reporters for friends and listed on his approved visiting list?

13. Did you cause or recommend plaintiff to be transfered to Lorton Central Facility in 1985 or 1986?
14. In your capacity as Plaintiffs classification officer in 1985 and 1986 did you and were you required to completely review plaintiffs records?
15. On the night of December 14, 15, 1988 did you accompany Plaintiff and other D.C. inmates on a flight to Spokane Washington and during the course of that flight was Plaintiff among the D.C. inmates videotaped without their written consent thereby resulting in a lawsuit naming you as a Defendant?
16. When did you learn that Plaintiff was to be returned to the Lorton Facility from the Washington State Corrections System?
17. Did you contact Washington State Prison officials and request that Plaintiffs property be sent to you and if so to whom did you speak to or write requesting this and when did this occur?
18. When was Plaintiffs property actually received by the D.C. Department of Corrections and did you notify Plaintiff in writing and give him the opportunity to designate a place where it should be sent (include all copies of correspondance and proof of mailing and receipt of mail)?
19. On August 18-19, 1989 did you accompany D.C. Corrections officers to the Western Missouri Correctional Center in Cameron Missouri and did you speak to Plaintiff at any time during August 18-19, 1989?
20. When did you contact Jesse Carter of 4241 58th Ave #9, Bladensburg Md 20710 and did you have a signed authorization by Plaintiff to release his property to Mr. Carter in your possession?

21. According to D.C. Department of Corrections Rules, Regulations and policy what is the definition specifically of an inmates immediate family and did Jesse Carter meet the criteria for an immediate family member?

22. When did Jesse Carter first notify you that Plaintiff did not wish for him to take possession of his property and what action if any did you take to recover Plaintiffs property and legal material from Jesse Carter and when was this action taken?

23. Did you have occasion to speak with or receive letters from attorneys Robert Hauhart, Jay Alexander and Steven Wienberg regarding Plaintiffs desire to have his property and legal material sent to him and when did these conversations take place and what action did you take to restore Plaintiffs property and legal material to him and when?

24. When you were contacted by Plaintiff, Jesse Carter or attorneys represently Plaintiff did you ever personally contact Plaintiff to resolve this problem and to get his legal material to him?

25. How many days had passed between the time you received or the D.C. Department of Corrections received Plaintiffs property and you released it to Jesse Carter?

26. Did you ever contact officials at F.C.I. Marianna Florida to assertain whether or not you could mail Plaintiffs property and legal materials to him and if so to whom did you speak, what was there response and on what dates did you speak to each or any official there?

27. Why was Plaintiff transfered to the B.O.P. while other D.C. inmates returned from Washington State and

returned to Lorton with Plaintiff were allowed to remain at the D.C. Correctional facility in Lorton Va.?

28. When Plaintiff left Western Missouri Correctional Center did you or any of the D.C. Correction officers making the transfer inventory the personal property Plaintiff accumulated during his one week stay and why or why not?

29. Were you ever instructed on the United States Constitution and it amendments in connection with your employment with the D.C. Department of Corrections and the fundamental rights of inmates?

Submitted By

/s/ Leonard R. Crawford El
Leonard R. Crawford El
Plaintiff Pro Se
1901 D St SE
Washington, D.C. 20003
#176-323

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APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-3076 (RCL)

LEONARD ROLLON CRAWFORD EL,

Plaintiff,

v.

PATRICIA BRITTON, et al.,

Defendants.

AFFIDAVIT

I, Patricia Britton, being first duly sworn, depose and say as follows:

1. I am employed as Coordinator, Special Projects, D.C. Department of Corrections.

2. My responsibilities include arranging for the transfer of inmates from the District of Columbia, Correctional Facilities to out-of-state correctional institutions, including Federal Bureau of Prison's (FBOP) Federal Correctional Institutions (FCI).

3. As part of my responsibilities I coordinated the movement of District of Columbia prisoners from the Washington State Correctional System to the Western Missouri Correctional Center, in August 1989. Plaintiff Leonard Rollon Crawford El was among them.

4. Because the Missouri facility determined that it could retain only twenty of the District of Columbia

inmates in the August 9, 1989 transfer, the rest, including Crawford El, were moved to Lorton within a week.

5. I had plaintiff Crawford El's property sent by the Washington state facility to my office at the District of Columbia Department of Corrections, in order to minimize the possibility of it being lost. The same was done with the property of the other prisoners who, with the plaintiff, were transferred from Washington state. My experience has been that this procedure is the best to keep prisoner's property from getting lost during transfers.

6. Shortly after the Missouri's facility informed us which prisoners it would not keep, a decision was made as to where they would go. Plaintiff Crawford El was among these. It was decided that he, among others, would be transferred to the Federal Bureau of Prisons at Marianna, Florida. The decision to move some of the inmates returning from Missouri to the Federal Bureau of Prison was made prior to returning the inmates housed in Missouri back to Lorton.

7. Plaintiff Crawford El's property arrived in my office, sealed, from the Washington facility *after* plaintiff had departed Lorton for the Federal Bureau of Prisons at Petersburg, Virginia on his way to his destination in Marianna, Florida.

8. By the time plaintiff's property arrived at my office, we had been advised by the Federal Bureau of Prisons that they would not accept the personal property of the prisoners.

9. I was aware that plaintiff's brother-in-law, Mr. Jesse Carter, worked in the Department of Corrections. I contacted Mr. Carter. I explained to Mr. Carter the situation and asked him if he would take plaintiff's boxes to Mr.

Crawford El's family. Carter willingly, voluntarily and without reticence took plaintiff's three sealed boxes of personal property. I did not force or cajole Mr. Carter into taking the boxes. Mr. Carter picked them up on October 5, 1989.

10. Mr. Carter never asked me to take plaintiff's boxes of property back.

11. I asked Mr. Carter if he would take plaintiff's personal property, only to insure its safety and protection from loss, and for no other reason whatsoever.

12. I do not recall plaintiff telling me that there were legal documents in his personal property, nor did I have knowledge of the contents of the three sealed boxes.

13. To the best of my knowledge, Mr. Carter delivered plaintiff's property to plaintiff's mother, and plaintiff's mother sent the property to plaintiff around January 24, 1990.

/s/ Patricia Britton
PATRICIA BRITTON

Subscribed and sworn to before me this 26th day of March, 1990.

/s/ Gloria D. Thoxton-Fox
NOTARY PUBLIC

My Commission Expires: DEC 15 1993

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-3076 (RCL)

LEONARD ROLLON CRAWFORD EL,

Plaintiff,

v.

PATRICIA BRITTON, et al.,

Defendants.

AFFIDAVIT

I, Jesse Carter, being first duly sworn, depose and say the following:

1. I am employed by the D.C. Department of Corrections in the Redevelopment Land Agency Program.

2. I am the brother-in-law of Leonard Rollon Crawford-El, and I know that said Mr. Crawford-El personally.

3. I think about August or September, 1989, Ms. Patricia Britton contacted me, requesting me to take from her about three or more boxes of property belonging to Mr. Crawford-El for delivery to him.

4. I think about August or September, 1989, I willingly took the said boxes of property from Ms. Britton and delivered same to Mr. Crawford's mother.

5. I thereupon notified Mr. Crawford of the delivery of the said boxes to his mother.

6. I returned to Ms. Patricia Britton and told her that Crawford-El informed me that they would give him his property; Ms. Britton still felt that the prison would not take the property.

7. I was informed by his mother that the boxes were mailed to Mr. Crawford on January 24, 1990.

/s/ Jesse Carter
JESSE CARTER

Subscribed and sworn to before me this 16th day of March, 1990.

/s/ Gloria D. Thoxton-Fox
NOTARY PUBLIC

My Commission Expires: DEC 15 1993

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA NO. 89-3076

LEONARD ROLLON CRAWFORD-EL
PLAINTIFF PRO SE

V

PATRICIA BRITTON, ET AL.
DEFENDANT

MOTION FOR LEAVE TO AMEND COMPLAINT
FOR VIOLATIONS OF CIVIL RIGHTS
PURSUANT TO RULE 15(a)
FED. RULES CIVIL PROCEDURE

COMES NOW, PLAINTIFF LEONARD ROLLON CRAWFORD EL, PRO SE AND MOVES THIS HONORABLE COURT TO ALLOW HIM TO AMEND THE ORIGINAL COMPLAINT FILED NOVEMBER 9, 1989

STATEMENT OF FACTS

1. Plaintiff is a D.C. Code Offender currently serving his sentence at the Federal Correctional Institute in Marianna, Florida and held per writ at the D.C. Detention Facility pending future hearings upon the matter at bar.

2. Plaintiff is a *Pro se* Prisoner who is without the advantages of legal training that might have assist him in making out a more complete complaint.

3. Plaintiff wishes to amend his original complaint to comply with Siegert v. Gilley 895 F2d 797 (D.C. Cir. 1990) and to allege his direct evidence of defendant Britton's unconstitutional intent.

4. Further to specify in his amended complaint exactly what harm has befallen him as a result of his legal documents being deprived him, as well as any other harm that occurred because of the handling of his property.

Prayer

WHEREFORE, upon consideration of the above plaintiff prays he be allowed to amend the complaint.

Respectfully Submitted

/s/ Leonard Rollon Crawford El
Leonard Rollon Crawford El
Plaintiff Pro se
c/o D.C. Detention Facility
1901 D Street, S.E.
Washington, D.C. 20003
DCDC# 176-323

[Certificate of Service Omitted in Printing]

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. NO. 89-3076 (RCL)

LEONARD ROLLON CRAWFORD EL
PLAINTIFF PRO SE

V.

PATRICIA BRITTON, ET AL
DEFENDANT

AMENDED COMPLAINT FOR
VIOLATIONS OF CIVIL RIGHTS
UNDER 42 U.S.C. 1983

JURISDICTION

1. This action is founded on the Constitution of the United States, 42 U.S.C. and the Common Law of the District of Columbia.

2. The Court has jurisdiction over the Federal Causes of Action set forth in the Complaint under 28 U.S.C. 1331 and 1343. This Court has jurisdiction over the Common Law Cause of Action set forth herein under the Doctrine of Pendent Jurisdiction, since it arises from a common nucleus of operative facts with federal causes at action and one would ordinarily be expected to try all of the causes of action in one judicial proceeding.

3. This Court has venue over the causes of action set forth in the complaint under 28 U.S.C. 1391.

PARTIES TO ACTION

4. Leonard Rollon Crawford EL, is a lifetime resident of the District of Columbia. He is the Plaintiff acting Pro se and is serving a sentence under the D.C. Code at the Federal Correctional Institute located PMB 7007, Creek B, Marianna, Florida 32446.

5. Defendant Patricia Britton is an official of the D.C. Department of Corrections and the Acting Interstate Contract Compact Administrator. Her principal place of business located within the District of Columbia at the D.C. Department of Corrections, 1923 Vermont Avenue, N.W., Washington, D.C. 20001.

STATEMENT OF FACTS

6. On Sunday April 20, 1986, The Washington Post published a news article concerning the D.C. Jail Crisis and the resulting overcrowding at the Lorton Occoquan Facility where plaintiff was being held and had organized and headed an inmate grievance committee seeking better living conditions for inmates.

7. Before and at the time of the publishing of the article Defendant Britton was employed by the D.C. D.O.C. and worked at the Lorton Occoquan Facility where plaintiff was held. In her official capacity as a Classification and Parole Officer she came into regular contact with plaintiff who was assigned to her caseload there.

8. Immediately after the article was published defendant ordered plaintiff bought before her in her office. Once there plaintiff was confronted by Britton who was visibly upset. Defendant Britton chastised plaintiff for his role in helping the reporters write the article and threatened to transfer him. She accussed plaintiff of rigging it so that the Post reporters came into the institution without

her knowledge or consent. At that point plaintiff showed defendant Britton where he had properly submitted the reporters names, listing their addresses as 1150 15th St., N.W., Washington, D.C. 20071, which is the address of the Washington Post Building in D.C. Defendant became enraged and accused plaintiff of tricking her whereby plaintiff pointed out to defendant Britton that he had not tricked her. The reporters were friends of his and the addresses were provided before hand and all that really occured was that she (Defendant Britton) had not done her job which was to verify names and addresses of visitors but instead rubber stamped the visit application made by plaintiff.

9. Defendant Britton made a telephone call trying to get plaintiff placed in the hole and when she could not told plaintiff that so long as he was incarcerated she was going to do everything she had to to make it as hard for him as possible as a result of his having met and spoke with the reporters and for allegedly embarassing her before her coworkers thru the article. Defendant Britton had plaintiff transfered to Central.

10. Plaintiff was transfered from the Lorton Maximum Security Facility to the Spokane County Jail on December 14-15, 1989. On December 17, 1989 plaintiff was quoted several times in another Washington Post article criticising the sudden move. Subsequently plaintiff was locked down and officials there informed him that Defendant Britton had told them Plaintiff was a "Troublemaker".

11. On July 28, 1989 Plaintiff was informed that he would be returning to Lorton. Instead of being sent directly back to Lorton he was sent instead to the Western Missouri Correctional Center, located Cameron Missouri on August 9, 1989. When plaintiff arrived at

Lorton on August 19, 1989, his property including his legal material concerning on-going cases did not arrive despite plaintiffs numerous inquiries to defendant Britton and to the Director of the D.C. Department of Corrections before his journey and after his arrival as to the contents of the property and the necessity for plaintiff to have the legal material contained therein.

12. On September 7, 1989, Plaintiff was transfered from Lorton to the Federal Bureau of Prisons at Petersburg, Virginia without first receiving his legal material and after having again requested to have his legal material and property, before leaving Lorton.

13. While at Petersburg plaintiff learned that Defendant Britton through an arbitrary abuse of her powers and in direct violation of D.C. DOC rules contacted plaintiff's brother in law without plaintiff's permission and arranged for plaintiff's brother in law to receive his all of his property including his legal material. Since this was done personally by Defendant Britton the mishandling of plaintiff's legal papers was not a bureaucratic error.

14. Defendant Britton refused all of plaintiffs pleas for the return of his legal material and property even though plaintiff enlisted the aide of several attorneys.

15. Plaintiff finally recovered his legal material and property eight months later after having had to fight and win a discrimination complaint against the warden at FCI Marianna for denying him to receive it due to the circumstances. As a result plaintiff has also wan the disfavor of the staff at FCI Marianna.

16. Plaintiff incorporates all of the stated facts of the original complaint into his amended complaint.

CAUSES

17. Defendant Britton as an individual and in her official capacity willfully and intentionally deprived plaintiff of his legal materials and personal property with the intention of interferring with his right to access to the courts and thereby causing plaintiff to suffer the following injuries:

plaintiff had to spend money to obtain underwear, tennis shoes, soft shoes, cosmetics and legal supplies during the eight months he was deprived of his property and legal materials;

when plaintiff was finally able to receive his property he incurred the cost of having 3 very heavy boxes loaded with legal materials and law books to him from D.C. to Florida first class mail;

plaintiff had brought pro se civil actions in Maryland and Washington State, he had filed administrative tort claims for injury and loss of property during transfer and had all of the supporting evidence of these actions which were of a very important minor and major consideration to his efforts in the property which was deprived him by defendant and made it impossible for him to proceed in an organized manner;

plaintiff suffered emotional trauma and duress, mental anguish and frustration, loss of sleep, worry, vexation, concern about future events, the possibility of procedural default in his pro se civil cases;

plaintiff was prevented from assisting his attorneys in representing him in a adequate way in that he was not able to refer to his records and notes and help his lawyers to make decisions effecting his future;

plaintiff was denied the emotional comfort of having photos of his loveones while separated;

plaintiff's filing of several small claims in D.C. was delayed unnecessarily;

defendant Brittons actions were the proximal cause of the dismissal of one pro se case entitled Crawford el v. Shapiro et at, 89-2060 JFM USDC/MD

and because of defendants Brittons actions plaintiff and his family were injured in that harsh feelings were felt toward plaintiff's brother in law for allowing himself to be cajoled by defendant into receiving his legal material without permission.

18. Defendant Britton deprived plaintiff of his legal material with the intent of interferring with his access to the courts in violation of the Sixth Amendment and in violation of the Fifth amendment due process right.

19. In so doing Defendant Britton denied plaintiff equal treatment under the 14th amendment and subjected him to cruel and unusaul punishment in violation of the 8th amendment.

Prayer

WHEREFORE THE PREMISES CONSIDERED THE PLAINTIFF DEMANDS JUDGEMENT AGAINST THE DEFENDANT BOTH IN HER INDIVIDUAL AND OFFICIAL CAPACITY IN THE AMOUNT OF FIFTY THOUSAND DOLLARS PUNITIVE AND FIFTY THOUSAND DOLLORS COMPENSATORY DAMAGES. PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully Submitted

/s/ Leonard Rollon Crawford El
Leonard Rollon Crawford El

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APPENDIX H

Government of the District of Columbia
DEPARTMENT OF CORRECTIONS
Suite N-102
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

[SEAL] JAN 09 1990

Mr. Robert C. Hauhart
Supervising Attorney
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001-2775

Dear Mr. Hauhart:

This responds to your December 20, 1989 correspondence relative to inmate property.

As pointed out in the attached letter dated December 22, 1989 from Mr. P.S. Wise, Administrator, Correctional Programs Branch, Bureau of Prisons, clear guidance regarding the processing of property of DOC inmates who are transferred to federal custody is provided.

We are therefore moving with deliberate speed to dispatch inmates property, including the four (4) individuals cited in your correspondence, in compliance with mentioned direction given by the Bureau of Prisons.

As always, we appreciate your helpful intervention into this issue of mutual concern.

Sincerely,

/s/ Paul A. Quander, Jr.
Paul A. Quander, Jr.
Acting Depty Director

Attachment

APPENDIX I

DEC 21 1989

Robert H. Reeder, Acting Chief
Case/Unit Management (N-117)
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Reeder:

Pursuant to your telephonic request, please accept this letter as clarification relative to personal property of DCDOC inmates who transfer to BOP custody.

As has been our past practice, inmates transferring from DCDOC to BOP custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents. This practice has been necessary based upon significant differences between DCDOC and BOP property politics and differences among individual BOP facilities. In special cases, we ask that DCDOC contact individual facility Inmate Systems staff for permission prior to mailing any inmate personal property to a BOP facility.

Please feel free to contact me if I may be of additional assistance.

Sincerely,

P.S. Wise, Administrator
Correctional Programs Branch

cc: Correctional Programs
DJDorworth File
GLIngram:DJDorworth:wmd:724-6601:search:reeder

APPENDIX J

PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
451 Indiana Avenue, N.W.
Washington, D.C. 20001-2775

December 20, 1989

Paul Quander, Esq.
Acting Deputy Director
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Room N-102
Washington, D.C. 20001

Re: Kenneth Ward
BOP No. 01429-000
USP Terre Haute, Indiana

Leonard Crawford-El
DCDC 176-323
BOP No. 00836-007
FCI Marianna, Fla.

James Neal
BOP No. 07216-000
USP Leavenworth, Kansas

Edward Ashford
BOP No. 02181-000
USP Terre Haute, Indiana

Dear Paul,

I am writing again on behalf of the above D.C. prisoners, now assigned to federal institutions, since I have heard no further from you since my letter of November

21, 1989 (copy enclosed) and a brief phone conversation on December 4, 1989. Briefly, each of the above residents is waiting to receive some or all of their property. I have set forth their individual circumstances below so that you may easily direct appropriate staff to arrange for locating and properly forwarding their respective property. Hopefully, that should end this matter. Please direct Mr. Reeder, Ms. Britton, or other Department staff to advise me in *writing* the dates on which the property has been forwarded. Correspondingly, I have instructed my clients to advise me when all property due has been received. Alternatively, my clients know to file "notice of intent to sue" letters pursuant to D.C. Code §12-309 and will pursue the matter in an appropriate proceeding if their property is not received.

Thank you for your attention to this matter.

Very truly yours,

/s/ Robert C. Hauhart
Robert C. Hauhart
Supervising Attorney

RCH/dsr
Enclosure
cc: Kenneth Ward
Leonard Crawford-El
James Neal
Edward Ashford

Kenneth Ward: 2 boxes of property received on 12-18-89; 2 boxes missing (contents: legal materials/legal mail and personal pictures and memorabilia)

Leonard Crawford: property released without permission to Jesse Carter (brother-in-law), 4241 58th Ave, Apt.

9, Bladensburg, Md. 20710, (301) 277-0675; Department needs to obtain property improperly released and forward, consistent with treatment now accorded other residents.

James Neal: 3 boxes of property sent back to D.C. from Walla Walla, Wa., plus 1 box of property sent back from Shelton Wa; none received to date.

Edward Ashford: property from Walla Walla, Wa and Shelton, Wa.; none received.

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-3076 (RCL)

LEONARD ROLLON CRAWFORD-EL

Plaintiff,

v.

PATRICIA BRITTON

Defendant.

DEFENDANT PATRICIA BRITTON AND NON-PARTY DISTRICT OF COLUMBIA'S MOTION FOR RECONSIDERATION OF THE COURT'S OF MAY 10, 1990

Defendant Patricia Britton and the District of Columbia (non-party) move the Court to reconsider its order of May 10, 1990, insofar as it denied defendant Patricia Britton's motion to dismiss and directed her to respond to plaintiff's outstanding discovery requests, and insofar as it directed the District of Columbia to treat plaintiff's outstanding discovery requests as having been served on it as a non-party and to respond to it. This reconsideration is sought in light of the decision in *Siegert v. Gilley*, 895 F.2d. 797 (D.C. Cir. 1990). As grounds therefore they state that:

1. Plaintiff's pleadings do not meet the heightened standard applied to plaintiff's claim of unconstitutional motive.

2. Plaintiff's pleadings failing to meet the heightened standard applied to plaintiff's claim of unconstitutional motive regarding defendant Britton's actions, the complaint fails to state a claim for which relief can be granted, and the Court lacks jurisdiction over the subject matter.

WHEREFORE, the defendant respectfully requests that the court's reconsider its order of May 10, 1990, and upon reconsideration, that the complaint be dismissed.

Respectfully submitted,

HERBERT O. REID, SR.
Acting Corporation Counsel, D.C.
MARTIN L. GROSSMAN
Deputy Corporation Counsel, D.C.
Civil Division
RICHARD S. LOVE
Assistant Corporation Counsel, D.C.
Chief, Correctional Litigation Section

/s/ Kenneth Marty
KENNETH MARTY (370494)
Assistant Corporation Counsel, D.C.
Attorneys for the Defendant and for the
District of Columbia
Correctional Litigation Section
1923 Vermont Avenue, N.W., #NLL-3
Washington, D.C. 20001
Tel. (202) 673-6698

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APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD R. CRAWFORD-EL

PLAINTIFF PRO-SE

V.

PATRICIA BRITTON, ET AL

DEFENDANTS

CA NO. 89-3076 (RCL)

PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION FOR RECONSIDERATION OF THE COURTS ORDER OF MAY 10, 1990 DENYING DEFENDANT BRITTON'S MOTION TO DISMISS

Comes Now Plaintiff Pro Se and submits the following Opposition to Defendant Brittons Motion For Reconsideration.

Defendant Britton argues that Plaintiffs pleadings do not meet the heightened standard applied to his claim of unconstitutional motive, and that because of this the complaint fails to state a claim for which relief can be granted and that the court lacks jurisdiction over the subject matter, Defendant cites Siegert c. Gilley, 895 F.2d 797 as grounds for relief.

Introduction

Plaintiff has brought a claim against Defendant for intentional denial of access to the courts. Due process

and equal treatment under the law through the deprivation of legal material, records and law books belonging to Plaintiff.

Unlike Plaintiff in Siegert v. Gilley, 895 F.2d 798 in the case at bar Plaintiff's action has met the heightened pleading standard for claims alleging unconstitutional motive. Plaintiff Crawford-El has submitted allegations of actions that no reasonable official could believe lawful and the Defendant in turn alleges she in fact took different actions that a reasonable official could believe lawful which at the very least would entitle Plaintiff to limited discovery.

Plaintiff further has alleged direct evidence of unconstitutional intent on the part of Defendant Britton and has produced direct evidence.

Wherefore Defendants Motion for Reconsideration must be denied.

Memorandum in Support of Plaintiffs Opposition to Defendant Patricia Brittons Motion For Reconsideration of the Courts Order of May 10, 1990

I. In this case the Courts jurisdiction is clear. Defendant Britton acted with bad faith and and malice in depriving Plaintiff of his legal materials; because of her embarrassment at having approved Washington Post reporters to visit Plaintiff in 1986 and the resulting articles. Her labeling of Plaintiff as a legal troublemaker; and having been named by Plaintiff in two previous and separate lawsuits.

Defendant claims that she did not act in bad faith and that she did not know that her acts denied Plaintiff any constitutional rights. Unlike Siegert v. Gillery Defendant Britton was advised by Plaintiff and Plaintiffs

attorneys numerous times before the filing of the Complaint that:

1. Plaintiff's legal material was contained in the property she deprived him of and that it pertained to current pending court actions.

2. That the D.C. Government and the D.C. Department of Corrections for which she acted had clearly established rules of procedure which she continually violated that were established to prevent said unconstitutional deprivation toward Plaintiff by her or others.

3. That her refusal to resolve the issue without Court action was direct evidence that her official acts toward Plaintiff were improperly motivated and unconstitutional in intent.

4. That in response to Plaintiffs and attorneys acting on Plaintiffs behalf requests; "That she act according to D.C. Department of Corrections policies and undo her intentional acts to deprive Plaintiff of his legal material"; she advanced no rational basis that could withstand any level of scrutiny for violating these laws and policies.

5. That there was no Government interest that was at stake that would outweigh Plaintiff rights.

6. That in light of pre-existing laws, rules and policy, the unlawfulness of her acts was apparent.

II. Once again Defendant Britton alleges that Plaintiffs Complaint fails to state a claim for which relief can be granted under 42 U.S.C. 1983. Plaintiff submits that Defendant through arbitrary abuse of her official powers while acting within the scope of her employment violated D.C. Government and D.C. Department of Corrections rules, policies and directives to intentionally deprive Plaintiff of his legal property, subject Plaintiff to cruel

and unusual punishment, deny him access to the Courts and to deny him due process and equal treatment under the law.

That Defendant Britton promised to make his incarceration as hard upon him as possible in 1986 and thereafter transfered Plaintiff, labled him a legal troublemaker, and used her official position to deprive Plaintiff of his legal materials, records and Court documents, caused Plaintiff to suffer violations of his Constitutional rights and caused him injury.

III. Defendant Britton further alleges that Plaintiff suffered little injury. However, in addition to Plaintiff being made to suffer emotional duress, mental anguish, mental frustration, vexation, concern about future events and monetary expenses; the unconstitutionally motivated acts of Defendant Britton bought about the proximal cause of the dismissal of one of Plaintiffs Court actions.

Crawford-El v. Shapiro et al, 89-2060 (JFM), U.S.D.C./MD was dismissed on May 4, 1990. Subsequent to Defendant Britton depriving Plaintiff of his legal material, Plaintiff was unable to respond to discovery requests in that matter, due to the requested material having been deprived him by Defendant Britton. As a result the court was required to continue the discovery and summary motion deadline not less than 3 times. When Defendants in 89-2060 JFM filed their Motions For Summary Judgment and Dismissal one of their strongest points was that Plaintiff cited no legal argument or case law to advance his position. Plaintiff could not adequately prepare his pleadings because he is handicapped by being at the D.C. Jail and having only 1 hour per week to visit the law library at the D.C. Jail to do legal research.

Were it not for the bad acts of Defendant Britton, discovery in that case would not of been delayed and Plaintiff would have been in Florida with 7 day a week access to the law library instead of in D.C. Jail. Therefore Defendant Patricia Brittons unconstitutionally motivated acts contributed to this injury to Plaintiff also.

IV. This Court has jurisdiction over the Federal causes of action set forth in the Complaint under Title 28 U.S.C. 1331, 1332, 1343. The Court has jurisdiction over the common law cause of action set forth under the doctrine of pendent jurisdiction since it arises from a common nucleus of operative facts with Federal causes of action.

This Court has venue over the causes of action set forth in the Complaint under 28 U.S.C. 1391.

Conclusion

Defendant Brittons actions were unconstitutionally motivated by her promise to make plaintiffs period of incarceration difficult and her labeling Plaintiff a legal troublemaker. Such intent is pleaded with specific discernable facts and offers of proof by Plaintiff through his submittal of numerous letters to Defendants advising them of the wrongfulness of their acts. Requesting an available remedy prior to litigation and the Defendants absolute refusal to take corrective measures over a period of eight months + plus.

The rights she violated were clearly established by pre-existing laws and the policies of the D.C. Government, D.C. Department of Corrections and further by the notification by attorney's acting on Plaintiffs behalf in the matter the Bill of Rights insures Plaintiff the right to associate with members of the press; the right to access to the Courts, the right to due process and the right to

equal protection of the law. The policies of the D.C. Government and the D.C. Department of Corrections are designed to protect the Constitutional rights of prisoners. They further detail by policy for the correct handling, authorized release, storage inventory, care, custody and personal control of a prisoners legal material and property both by the prisoner and the prison officials.

No reasonable official of the D.C. DOC could believe that Defendant Patricia Brittons acts were lawful due to the established policies and the training D.C. DOL employees receive.

Defendant Britton began her career with the D.C. DOC as a uniformed correction officer. Each of her accellerated promotions included detailed training and job descriptions that include prisoner and citizen rights.

Defendant Britton violated those rules, policy, and her training through an abritrary abuse of her official powers.

Defendant Britton knew or reasonably should have known her acts might give rise to liability for damages. If by some act of God she didn't know initially she certainly knew after being telephoned on many occasions and by written communications addressing this sent to her by attorney Robert C. Hauhart of the D.C. Public Defender Service Prisoners Rights Program and Attorneys Jay L. Alexander and Steven Wienberg.

Plaintiff has alleged and produced direct evidence of unconstitutional intent along with the original complaint, in his response to defendants pleadings and in open court.

Judge Royce C. Lamberth was correct in denying Defendant Brittons Motion To Dismiss her as a Defendant. The case law cited by Defendant Britton does not support her contentions.

Defendant Patricia Brittons claim of immunity as a Government official is defeated and Plaintiff's claim has met the heightened pleading standard for claims alleging unconstitutional motive.

Plaintiff had right to expect D.C. DOC officials to act according to D.C. DOC policy and the law.

Wherefore all of the foregoing the Motion for Reconsideration by Defendant Britton should be denied and other appropriate relief should be granted by the Court in Plaintiffs favor.

Respectfully submitted,

/s/ Leonard R. Crawford-El
Leonard R. Crawford-El
Plaintiff Pro Se
1901 D Street, S.E.
Washington, D.C. 20003

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-89-2060

LEONARD ROLLON CRAWFORD-EL

v.

SAMUEL M. SHAPIRIO, ESQ.

SCHEDULING ORDER

1. Discovery deadline – December 11, 1989
2. Status report due – December 11, 1989
3. Summary judgment motions deadline – January 11, 1990

Date: October 16, 1989

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-89-2060

LEONARD ROLLON CRAWFORD-EL

v.

SAMUEL M. SHAPIRO, ESQ., et al

SCHEDULING ORDER

1. Discovery deadline – January 25, 1990
2. Status report due – January 25, 1990
3. Summary judgment motions deadline – February 26, 1990

Date: October 25, 1989

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

Law Offices
JORDAN COYNE SAVITS & LOPATA
1030 Fifteenth Street, N.W.
Washington, D.C. 20005

January 23, 1990

The Honorable Frederick Motz
United States District Judge
Room 510
United States District Court
for the District of Maryland
U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: Crawford-El v. Shapiro, *et al.*
Civil Action No. JFM-89-2060
Our File No.: 0007.880046

Dear Judge Motz:

This is submitted as our status report required by your Scheduling Order of October 25, 1989, and which is due on January 25, 1990. In brief, both parties have served interrogatories and a request for production of documents. On behalf of defendants, on December 5, 1989, we mailed to the plaintiff answers to his interrogatories, about four inches worth of documents in response to his request for production of documents, and interrogatories and a request for production of documents addressed to him. Subsequently, the plaintiff, by letter dated January 11, 1990, has claimed that he never received the materials that we sent to him at his prison address in Marianna, Florida. Nor have these materials been returned to us by the Post Office.

In addition, in his recent response to our first request for production of documents, the plaintiff has disclosed that he is unable to provide responsive documents because he was separated from his records and property when he was transferred from a prison in Washington State to the institution in Marianna, Florida.

As a result of these developments, which are not surprising in view of the fact that the plaintiff is proceeding *pro se* and is incarcerated in Florida, it has not been possible to complete discovery by January 25, 1990. We respectfully request, on behalf of the defendants, that discovery be kept open past January 25, 1990, at least for the purpose of the completion of responses to all pending discovery requests.

In view of the foregoing, we also respectfully request that the deadline for filing of the Motion for Summary Judgment be extended until after discovery has been completed.

Respectfully submitted,

/s/ Joel M. Savits
Joel M. Savits

DBS:jfs

cc: Mr. Leonard Rollon Crawford-El

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

January 26, 1990

MEMORANDUM TO MR. CRAWFORD-EL
AND COUNSEL RE: Crawford-El v. Shaprio
Civil No. JFM-89-2060

Dear Mr. Crawford-El and Mr. Savits:

I am in receipt of Mr. Savits' letter of January 23, 1990.

Extensions of the discovery deadline and the summary judgment motion are in order. However, I am not willing to make those extensions open-ended. Accordingly, the Scheduling Order entered on October 25, 1989 is hereby modified as follows:

Discovery deadline – March 27, 1990

Summary Judgment Motions deadline – April 26, 1990

Despite the informal nature of this ruling, it shall constitute an order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-89-2060

LEONARD ROLLON CRAWFORD-EL

v.

SAMUEL M. SHAPIRO, et al.

Civil No. JFM-89-2060

ORDER

For the reasons stated in the memorandum entered herein, it is this 4th day of May 1990

ORDERED

1. Defendants' motion for summary judgment is granted; and

2. Judgment is entered in favor of defendants against plaintiff.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

APPENDIX M

[SEAL]

Government of the District of Columbia
DEPARTMENT OF CORRECTIONS
1923 Vermont Avenue, N.W., Suite N-117
Washington, D.C. 20001

07 NOV 1989

Mr. James Neal
Reg. No. 07216-000
U.S.P.
Leavenworth, Kansas 66048

The Federal Bureau of Prisons has advised this office that they will not accept your personal property. Therefore, I am requesting that you forward to this office a current address and the name of someone I can mail your personal property to.

If I do not here from you within thirty (30) days regarding this matter, I will assume that you are authorizing us to destroy your personal property.

Sincerely,

/s/ Patricia Britton
Patricia Britton
Coordinator Special Projects

Attachment 1
Civ. Action No. 89-3076 (RCL)

[SEAL]

Government of the District of Columbia
DEPARTMENT OF CORRECTIONS
1923 Vermont Avenue, N.W., Suite N-117
Washington, D.C. 20001

07 NOV 1990

Mr. Edward Ashford
Reg. 02181-000
FCI
Springfield, Missouri 65808

The Federal Bureau of Prisons has advised this office that they will not accept your personal property. Therefore, I am requesting that you forward to this office a current address and the name of someone I can mail your personal property to.

If I do not here from you within thirty (30) days regarding this matter, I will assume that you are authorizing us to destroy your personal property.

Sincerely,

/s/ Patricia Britton
Patricia Britton
Coordinator Special Projects

Attachment 2
Civ. Action No. 89-3076 (RCL)

EXHIBIT 3

(6)

No. 96-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
(202) 328-2244
Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 328-3286

29 pp

QUESTIONS PRESENTED

1. In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by "clear and convincing" evidence?

2. In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason for the act was unconstitutional?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Leonard Rollon Crawford-El, plaintiff-appellant, and Patricia Britton and the District of Columbia, defendants-appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, appear in the Appendix to the Petition for Writ of Certiorari ("App. to Pet. for Cert.") at 1a-95a and are reported at 93 F.3d 813. The district court's opinion dismissing petitioner's complaint, App. to Pet. for Cert. 115a-141a, is reported at 844 F. Supp. 795. The district court's opinion denying reconsideration, App. to Pet. for Cert. 110a-114a, is reported at 863 F. Supp. 6.

The opinion of the court of appeals on respondent's interlocutory appeal appears at App. to Pet. for Cert. 145a-160a. It is reported at 951 F.2d 1314.

Other opinions and orders entered in the case are unreported.

JURISDICTION

The judgment of the court of appeals was entered August 27, 1996. The petition for writ of certiorari was filed November 25, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Crawford-El, a District of Columbia prisoner, filed a complaint in the district court under 42 U.S.C. § 1983 alleging, *inter alia*, that respondent Britton, a District of Columbia Department of Corrections official, retaliated against him for his exercise of First Amendment rights. Petitioner's First Amendment retaliation claim against Britton, the only claim addressed by the *en banc* court of appeals, is the only claim at issue.[1]

Facts

The district court stated the First Amendment retaliation claim against Britton as follows:

> Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed

[1] The appellate court's disposition of petitioner's First Amendment retaliation claim against the District of Columbia, arising from the same incidents, was entirely in petitioner's favor. App. to Pet. for Cert. 96a-99a.

> informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

App. to Pet. for Cert. 126a. In support of this claim, petitioner's verified complaint reported specific incidents in which respondent manifested her knowledge of petitioner's First Amendment activity, her hostility toward him on account of it, and her retaliatory intent. As the district court noted:

> (1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)
>
> (2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a

correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him to see what he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She [attempted to place him in restrictive confinement,] threatened to make life hard for him in jail any way she could [for as long as he was incarcerated, and had him transferred to another facility]. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion [a December 1988 airplane trip transferring Crawford-El and others to Washington State] that prisoners like Crawford-El "don't have any rights." [She made this remark in response to complaints by Crawford-El and other prisoners on the airplane that an officer's videotaping of them handcuffed and chained violated their privacy.] (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect ["What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds"], Britton told another prison official that

Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

App. to Pet. for Cert. 129a-130a (district court opinion) and App. to Pet. for Cert. 178a-180a (additional details stated in the Fourth Amended Complaint).

During the six months following the December 1988 transfer to Washington State, Crawford-El and several other prisoners submitted to the D.C. Mayor letters noting their intent to sue the District of Columbia over the videotaping that Britton had allowed during the transfer. App. to Pet. for Cert. 181a.

Soon thereafter, in July 1989, Britton told Washington State authorities to seize and send to her office in the District of Columbia all of the transferred prisoners' property, because the prisoners were to be moved again. App. to Pet. for Cert. 181a-182a. During the next several weeks, prison officials sent Crawford-El to various facilities, and then to the federal prison in Marianna, Florida. During this period Crawford-El wrote to Britton, and spoke with her in person and by telephone, repeatedly telling her that he needed the legal materials she had seized. App. to Pet. for Cert. 183a-185a. Britton, however, diverted Crawford-El's property outside prison channels to Crawford-El's brother in law, Jesse Carter, whom Crawford-El had not authorized to receive it. App. to Pet. for Cert. 184a-185a. She told Carter that Crawford-El "should be happy she did not throw it in the trash." App. to Pet. for Cert. 186a.

Because Britton had diverted Crawford-El's property outside prison channels, federal prison officials in Marianna initially refused to allow Crawford-El to receive it when he had his mother mail it to him at his own expense. App. to Pet. for Cert. 188a. To receive his property, Crawford-El had to submit a grievance, which caused federal prison officials to become

hostile toward him. *Id.* He finally received his property in February 1990, over six months after Britton had seized it. *Id.*

District Court Opinion

The district court held that

> [a] jury might reasonably infer from [the complaint's] allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker."

App. to Pet. for Cert. 131a. The district court also held that

> [b]ecause Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

App. to Pet. for Cert. 127a. The district court nonetheless dismissed this claim. The court held the complaint failed to plead "direct" evidence of Britton's unconstitutional intent, as required by circuit precedent applicable at the time. App. to Pet. for Cert. 131a.

***En Banc* Appellate Opinions**

The *en banc* court of appeals unanimously discarded the circuit's previous direct evidence rule. App. to Pet. for Cert. 11a-12a, 44a, 58a, 72a, 78a. Five members of the court, however, decided that Crawford-El must prove Britton's unconstitutional intent by "clear and convincing" evidence, in order to overcome her qualified immunity. App. to Pet. for Cert. 3a (opinion of Williams, J., in which three other judges joined); App. to Pet. for Cert. 58a (opinion of Ginsburg, J.). These five judges maintained that the evidence recited in Crawford-El's

verified complaint was not clear and convincing and that Britton would be entitled to summary judgment unless Crawford-El presented additional evidence meeting that standard. App. to Pet. for Cert. 34a, 71a. Judge Williams said Crawford-El should be required to present this evidence without being allowed any discovery. App. to Pet. for Cert. 3a. Judge Ginsburg would allow discovery if petitioner showed a "reasonable chance" that discovery would produce clear and convincing evidence of unconstitutional intent. App. to Pet. for Cert. 58a-60a.

Judge Silberman urged a different test. He said that an official who asserts a legitimate justification for a challenged act should be entitled to qualified immunity if the asserted justification would have been a reasonable basis for the act, even if evidence --no matter how strong--shows the official's actual reason was unconstitutional. App. to Pet. for Cert. 46a-50a.

Five members of the court rejected both the "clear and convincing" evidence standard and Judge Silberman's approach. They said the qualified immunity doctrine does not alter a plaintiff's burden of proof on the merits and that the evidence recited in petitioner's verified complaint entitles him to trial. App. to Pet. for Cert. 93a-94a.

SUMMARY OF ARGUMENT

The unprecedented holdings below that qualified immunity alters the burden of proof in cases of retaliation for exercise of First Amendment rights--five judges requiring "clear and convincing" evidence of unconstitutional intent, one judge requiring proof that a defendant's asserted justification is unreasonable, though evidence shows it was not the actual motive--fail to meet the heavy burden of justification required by *Anderson v. Creighton*, 483 U.S. 635 (1987). These proposals have no roots in common law immunity. They are unnecessary

to accomplish the purposes of qualified immunity recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Firm application of the rules of civil procedure, *Harlow*, 457 U.S. at 819 n.35 (1982), is fully adequate to ensure the accomplishment of *Harlow*'s goal--dismissal of insubstantial claims without trial or broad-reaching discovery. *Id.* at 814. Under the federal rules, a bare allegation of unconstitutional intent does not entitle a plaintiff to discovery. A defendant, moreover, may quickly discover the basis, if any, for a plaintiff's allegation and obtain summary judgment against a plaintiff who can show neither admissible evidence of unconstitutional animus nor a reasonable likelihood of discovering it. A plaintiff who shows only a reasonable likelihood of successful discovery is entitled only to discovery "tailored specifically" to that showing, *Anderson*, 483 U.S. at 647 n.6, after which the defendant again is entitled to seek summary judgment, asserting either absence of evidence of unconstitutional intent or proof that the same action would have been taken in any event for a legitimate reason. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). These standards fully satisfy the need for prompt dismissal of insubstantial First Amendment retaliation claims.

Adoption of either the "clear and convincing" evidence standard or Judge Silberman's proposal would have consequences that are far-reaching and deleterious. In several settings, an action for damages against individual government officials is the only judicial remedy capable of vindicating constitutional rights. The legal standards proposed below by six judges would imperil First Amendment claims arising from government agents' covert destruction of political organizations, *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). They would imperil discrimination claims and the claims of government employees and prisoners who suffer official retaliation for protected speech on matters of public concern. They would endanger civil liberty and democracy.

ARGUMENT

I. A PROPOSAL TO BALKANIZE QUALIFIED IMMUNITY BY TYPE OF CONSTITUTIONAL CLAIM FACES A HEAVY BURDEN OF JUSTIFICATION

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court rejected a proposal to except from "the usual principles of qualified immunity" a particular type of Fourth Amendment claim. *Id.* at 642. The Court said this proposal faced a "heavy burden" and "emphasized that the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'" *Id.*, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring). The Court held

> we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the . . . precise character of the particular rights alleged to have been violated. . . . We are unwilling to Balkanize the rule of qualified immunity . . . at the level of detail the Creightons propose.

Anderson, 483 U.S. at 643, 646.[2]

---

[2] "An immunity that has as many variants as there are . . . types of rights would not give . . . that assurance of protection that it is the object of the doctrine to provide," *Anderson*, 483 U.S. at 643--at least not until the variant of immunity for each type of right were finally decreed. Until that time, prospective government officials could not properly assess whether the risks of liability seem to them to be too great to make government employment attractive. *Harlow*, 457 U.S. at 814 (avoiding "deterrence of able citizens from acceptance of public office" is an important goal of qualified immunity). If the extent of immunity from one type of claim were greater (out of perceived need to avoid deterrence of job applicants) than that for another, with the extent of immunity as to many other types of claims unknown, an (footnote continued)

The Balkanizing proposals proffered below would create, for a particular category of claims, qualified immunity that borders on absolute immunity. Chief Judge Edwards, joined by four other judges, noted that the opinions of their six opposing colleagues

> invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials--whether or not meritorious--would *never* be able to survive a defendant's assertion of qualified immunity.

App. to Pet. for Cert. 78a (emphasis in original).

There is, however, a "presumption . . . that qualified, rather than absolute, immunity is sufficient to protect government officials in the exercise of their duties," *Burns v. Reed*, 500 U.S. 475, 486-487 (1991). "The burden of justifying absolute immunity rests on the official asserting the claim." *Harlow*, 487 U.S. at 812. Absolute immunity, moreover, is based on the nature of an official function, not the type of constitutional violation at issue. Absolute immunity is granted only for performance of "functions[s] so sensitive as to require a total shield from liability." *Id.*[3]

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official who would be deterred from employment unless the greater degree of immunity also applied to many other claims would be unable to make an informed choice to enter government service. Proposals to increase the extent of qualified immunity with respect to one type of claim would inject uncertainty into immunity law, just as would proposals to diminish the scope of immunity as to a particular type of claim.

[3] Respondent Britton does not perform such functions. *Butz v. Economou*, 438 U.S. 478 (1978).

Immunity from liability under 42 U.S.C. § 1983 is "essentially a matter of statutory construction." *Butz v. Economou*, 438 U.S. 478, 497 (1978). "Section 1983, on its face, [however], admits of no defense of official immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). The source of immunity is the presumption that Congress did not intend to abolish common law immunities "well established in 1871, when 1983 was enacted." *Id.*, quoting *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967). For this reason, the *Buckley* Court said,

> "[w]e do not have a license to establish immunities from 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-923 (1984). "[O]ur role is to interpret the intent of Congress in enacting 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

509 U.S. at 268.[4]

Public policy considerations can warrant adjustment of the contours of historically-rooted immunity. *Anderson*, 483 U.S. at 645. In *Harlow*, presidential aides "advanced persuasive arguments" requiring "an adjustment" of the immunity standard stated in *Wood v. Strickland*, 420 U.S. 308 (1975). *Harlow*, 457 U.S. at 815. In response to these arguments, *Harlow* retained only the objective component of the *Wood* standard, which denied immunity for violations of "clearly established constitutional rights." *Wood*, 420 U.S. at 322. The Court trimmed away alternative subjective elements that denied immunity if an official had "malicious intention to cause a deprivation of constitutional rights or other injury," *id.*, even if

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[4] *See also*, Argument II of the brief for amicus William G. Moore, Jr.

no violation of clearly established constitutional rights had occurred.[5]

The purpose of the *Harlow* adjustment was to ensure "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. Under *Harlow*, "insubstantial lawsuits" are those presenting no violation of clearly established constitutional law. Absence of such a violation is dispositive. Mere subjective desire to cause either a constitutional violation or "other injury" is, by itself, no longer a basis for denial of immunity.

Harlow illustrates the type of adjustment in the qualified immunity doctrine which public policy considerations can warrant by themselves, without reference to common law. Prior to *Harlow*, a plaintiff could obtain a damage award against an official for a constitutional violation not clearly established in law at the time the official acted, but only if the official happened to have subjectively desired to inflict either (a) harm believed by the official (correctly or incorrectly) to be a constitutional injury or (b) some other type of injury. *Harlow* trimmed away these odd considerations, which are irrelevant to deterring and compensating injured persons for violations of clearly established constitutional rights, and which would compensate the injured for newly-recognized violations only in odd or fortuitous circumstances.

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[5] The *Anderson* opinion said *Harlow* had "completely reformulated qualified immunity [by] . . . *replacing* the inquiry into subjective malice . . . with an objective inquiry into the legal reasonableness of the official action." 483 U.S. at 645 (emphasis added). The objective inquiry, however, had been included in the *Wood* standard. 420 U.S. at 322. *Harlow* stripped away the subjective malice inquiry, *leaving* the previously-announced objective component as the only test.

Like the instant case, *Harlow* concerned a First Amendment retaliation claim. Unlike the opinions of six judges below, however, *Harlow*'s adjustment in immunity law did not alter plaintiffs' burden of proof on the merits. Nor did the *Harlow* adjustment create a standard bordering on absolute immunity. *Harlow* expressly considered, and rejected, the defendant officials' claim of absolute immunity. *Harlow* does not support the proposition that the type of unprecedented and "astonishing" alterations in qualified immunity proposed by six judges below are within the Court's power to order solely on the basis of public policy "cost-benefit analysis." App. to Pet. for Cert. 78a, 87a (opinion of Edwards, C.J.). Under *Butz*, *Buckley*, *Tower* and *Malley*, the heavy burden faced by the changes proposed below includes the burden of finding support in the well-established common law of 1871. Analysis attempting to justify these changes solely on the basis of public policy can only be deemed to be "freewheeling," and impermissible.

II. THE BALKANIZING PROPOSALS URGED BELOW ARE UNSUPPORTED BY COMMON LAW AND UNNECESSARY TO ACCOMPLISH THE PURPOSES OF QUALIFIED IMMUNITY

The opinions below urging drastic change of the evidentiary standards in First Amendment retaliation cases do not claim to find support in the common law. This is not, moreover, merely because there is no analogous common law counterpart to a First Amendment retaliation claim.[6] In 1871, no common law immunity, from any type of claim, imposed the clear and

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[6] Although the particular retaliatory acts at issue here constitute common law conversion, *Fotos v. Firemen's Ins. Co.*, 533 A.2d 1264 (D.C. 1987), conversion is not generally analogous to retaliation for exercise of First Amendment rights.

convincing evidence standard proposed below by five judges, let alone the unusual framework suggested by Judge Silberman.[7] For this reason alone, the Court should hold that reading into § 1983 the proposals of these six judges is simply not a permissible means of statutory construction.

Apart from this point, it is also true that the changes proposed below are unnecessary to accomplish the purposes of the qualified immunity doctrine. This emerges from the reasoning of *Harlow*, developments in summary judgment law since *Harlow* was decided, and differences between First Amendment retaliation claims and claims arising under the pre-*Harlow* qualified immunity standard.

In *Harlow* the Court stripped away the subjective elements of the *Wood* standard to ensure "the dismissal of insubstantial lawsuits without trial." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The Court reasoned that "an official's subjective good faith has been considered to be a question . . . inherently requiring resolution by a jury," and that "there is often no clear end to the relevant evidence" regarding a subjective intent that arises from a "decisionmaker's experiences, values, and

[7] Even if the absence of a common law counterpart to First Amendment retaliation claims were thought to be a factor distinguishing this case from those in which appropriate common law counterparts can be identified, this "silence" of the common law would not justify immediate resort to freewheeling policy analysis. "[D]evising limitations to a remedial statute, enacted by Congress," is not the same judicial task as developing the common law. *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Mere failure of a federal statute to contemplate a particular situation does not empower the judiciary to fill the perceived gap with a decision based on cost-benefit analysis. Amendment of the statute, if appropriate, is a task for Congress. *See* Chief Judge Edwards's opinion, App. to Pet. for Cert. at 78a.

emotions." *Id.* at 816-17. The Court said, "[j]udicial inquiry into [such] motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues"--an inquiry "peculiarly disruptive of effective government." *Id.* at 817. For these reasons, the Court concluded "that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The Court called for "firm application of the Federal Rules of Civil Procedure" to accomplish this end. *Id.* at 819, n.35, quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978).

Harlow, however, did not announce a change in the burden of proof in First Amendment retaliation cases. It is hardly apparent, moreover, that the Court thought, or would have thought, that its newly-announced qualified immunity adjustments are inadequate to ensure "dismissal of insubstantial [First Amendment retaliation] lawsuits without trial." *Harlow*, 457 U.S. at 814. *Harlow*, itself, involved a First Amendment retaliation claim.[8]

No other appellate courts have perceived the need for the "clear and convincing" evidence standard urged by Judge Williams. Chief Judge Edwards wrote:

> [I]f a "clear and convincing" evidence standard were truly necessary to vindicate defendants' [qualified immunity], as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed,

[8] According to Judge Williams's reasoning, App. to Pet. for Cert. at 17a-18a, the *Harlow* Court must have either failed to realize that its adjustments were insufficient to accomplish the goals of qualified immunity in First Amendment retaliation cases or necessarily did realize this, but never said so. Either alternative is difficult to accept.

> although nearly every other federal appeals court in the nation has addressed the precise issue that we face today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view this case differently.

App. to Pet. for Cert. 87a-88a (emphasis in original) and 88a n.7 (collecting cases from ten circuits).

Further alteration of the *Harlow* standard is not necessary to accomplish the goals of qualified immunity in First Amendment retaliation cases. Contrary to Judge Williams's assumption, App. to Pet. for Cert. at 17a, First Amendment retaliation claims arising after *Harlow* do not present the same litigation burdens that were presented by pre-*Harlow* claims arising when subjective good faith was an element of qualified immunity. "[C]larifications to summary judgment law [after *Harlow*] have alleviated" the difficulty in "securing summary judgment regarding . . . subjective intent," enabling "the strength of factual allegations such as subjective bad faith [to be] tested at the summary-judgment stage." *Wyatt v. Cole*, 504 U.S. 158, 171 (Kennedy, J., concurring), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[9]

Two differences between First Amendment retaliation claims and pre-*Harlow* cases governed by the *Wood* standard also support this point. First, unconstitutional intent is a more specific state of mind than the general malicious desire to inflict injury that precluded immunity under the *Wood* standard. Compared to subjective bad faith, retaliatory intent contemplates a narrower range of "decisionmaker[] experiences, values, and

[9] In *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995), for example, the court, on interlocutory appeal from denial of qualified immunity, ordered entry of summary judgment rejecting a First Amendment retaliation claim, without applying a heightened burden of proof.

emotions" and defines a "clear[er] end to the relevant evidence." *Harlow*, 457 U.S. at 816, 817. Judicial inquiry into this intent, limited by firm application of the federal rules, is less burdensome than pre-*Harlow* inquiry into subjective bad faith.

Second, a defendant in First Amendment retaliation cases can seek summary judgment on the ground that, even if unconstitutional animus might have been a substantial factor motivating the defendant's injurious act, the same action would have been taken for a legitimate reason. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). Summary judgment properly granted on this ground obviates the need for extensive inquiry into unconstitutional intent. The Court has recognized that "fending off baseless First Amendment lawsuits [on this ground] should not consume scarce government resources." *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996).

Chief Judge Edwards's opinion below showed specifically how "firm application of the Federal Rules of Civil Procedure" is "more than adequate to dispose of unmeritorious claims" prior to trial "without . . . new evidentiary standards designed to address particular categories of cases." App. to Pet. for Cert. at 85a. He cited the district court's power "to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity." App. to Pet. for Cert. 83a. This kind of initial discovery enables the defendant quickly to determine, before answering any discovery by the plaintiff, whether to seek summary judgment based on plaintiff's inability to prove unconstitutional intent. Under Rule 56, a plaintiff responding to such a summary judgment motion must either present evidence of unconstitutional intent or "show a reasonable likelihood" that allowing discovery by the plaintiff "will uncover evidence" proving that element of the claim. App. to Pet. for Cert. 84a. The district court's power to limit all discovery to "the needs of the case," in order to avoid undue "burden or expense," also

cited by Chief Judge Edwards, App. to Pet. for Cert. 83a and n.5 (quoting Fed. R. Civ. P. 26(b)(2)(iii)), can ensure that any discovery allowed under Rule 56(f) is tailored to the reasonable likelihood shown by the plaintiff.

These principles fully satisfy the need to dismiss insubstantial First Amendment retaliation claims without trial. Further alteration of the *Harlow* standard is unnecessary to accomplish this goal.[10]

III. A HEIGHTENED BURDEN OF PROOF IN UNCONSTITUTIONAL ANIMUS CASES WOULD IMPROPERLY BALANCE OFFICIALS' NEED FOR IMMUNITY AND THE COMPETING NEEDS FOR DETERRENCE OF UNCONSTITUTIONAL CONDUCT AND COMPENSATION OF VICTIMS

"The purpose of 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992), citing *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978). "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

[10] Alteration of the qualified immunity standard solely for unconstitutional animus cases arguably would require further Balkanizing of qualified immunity, contrary to *Anderson v. Creighton*, 483 U.S. 635 (1987). For example, if preponderance of the evidence were deemed appropriate for all objective elements of claims, but clear and convincing evidence were required for unconstitutional animus, an intermediate standard arguably would be appropriate to prove a state of mind such as deliberate indifference to a prisoner's need for safety or medical care. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994).

Due to States' Eleventh Amendment immunity, an action for damages against individual state officials is the only remedy for constitutional violations such as those alleged in *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (shooting of political demonstrators by National Guard troops).

The qualified immunity doctrine balances the purposes of § 1983 against the "social costs" incurred when "claims . . . run against the innocent." *Harlow*, 457 U.S. at 814. These costs include "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office," and the risk that fear of litigation will cause officials to be timid in the performance of their duties. *Id.* The balance is properly struck when insubstantial suits--those not based on clearly established law or not grounded in available facts and reasonable inferences--are dismissed without trial, and without broad-ranging discovery. *Id.* at 814, 815, 818.[11]

We have shown that the proposals of six judges below are not necessary to ensure prompt disposition without trial of insubstantial claims premised on unconstitutional animus. These proposals therefore fail to balance properly the purposes of § 1983 against the considerations supporting qualified immunity. The proposals below unnecessarily and severely restrict not only

[11] *Harlow* did not expressly mention available facts and reasonable inferences as criteria for judging the pre-trial substantiality of claims based on clearly established law, but these criteria can be inferred from *Harlow*'s demand for "firm application of the Federal Rules of Civil Procedure." 457 U.S. at 819, n.35. In general, a complaint, a request for discovery, an opposition to a motion to dismiss, or a pre-discovery opposition to a motion for summary judgment satisfies the rules applicable to these documents if it is based on valid points of law and grounded in available facts and reasonable inferences.

the right to trial of substantial, clearly-established claims, but also the ability of injured parties with meritorious claims to prevail and obtain redress.[12]

The consequences of the proposals below would be deleterious and far-reaching. They would diminish deterrence of unconstitutional discrimination, as well as impair the pursuit of redress in First Amendment retaliation cases.[13] The proposed legal standards would imperil First Amendment claims arising from government agents' covert destruction of political organizations. *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). The result would endanger civil liberty and democracy. The proposed legal standards would leave government employees without effective relief from retaliation by their superiors for their exercise of First Amendment rights. Employee speech on public matters would be deterred, and public debate would suffer. *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994)

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[12] Judge Williams argued that his proposal for a clear and convincing evidence standard is supported by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), because there the Court, by analogy to federal officials' absolute immunity from common law libel claims, required that libel suits by officials seeking damages for published criticism of their performance of discretionary duties be supported by clear and convincing evidence of actual malice. App. to Pet. for Cert. 21a. The Court, however, adopted this standard to protect First Amendment freedom. Judge Williams's proposal would apply this standard to impair First Amendment liberty in favor of official immunity, which is not a constitutional right. Federal officials' absolute immunity from common law claims, moreover, is greater than their qualified immunity from constitutional claims. *Butz v. Economou*, 438 U.S. 478 (1978). The reasoning of *New York Times* therefore does not support Judge Williams's view. *See* Chief Judge Edwards's opinion, App. to Pet. for Cert. at 91a-92a.

[13] *See* the brief for amicus William G. Moore, Jr., at 8-9.

("[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions").[14] A similar point applies to prisoners' First Amendment claims. Unchecked retaliation against prisoners who communicate with the press, the public, and the courts about prison conditions would deter their speech on these important public matters, contrary to the public interest. *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971).

Even where recovery for injury might be obtained on other legal theories, the public interest would be disserved by perfunctory termination of substantial First Amendment retaliation claims arising from the same injury. If police shoot political demonstrators, it is in the public interest to allow the victims to pursue any substantial claim that official hostility to their political views motivated the shooting. Confining their suit to a Fourth Amendment excessive force claim would be incompatible with not only the view that posits the preferred position of First Amendment rights, *Kovacs v. Cooper*, 336 U.S. 77 (1949), but also the view that these rights deserve no less protection than other constitutional liberties.

CONCLUSION

The Court should hold that qualified immunity does not alter a plaintiff's burden of proof in First Amendment retaliation cases. The Court should embrace the opinion of Chief Judge Edwards and remand the case for further proceedings.

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[14] Knowledge that retaliation for protected speech, including the ruining of one's career, could be inflicted without the availability of an effective remedy would deter "able citizens from acceptance of public office," *Harlow*, 457 U.S. at 814, as readily as would insufficient qualified immunity.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT

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October, 1997

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This is an action brought by petitioner Crawford-El, a long-time prison inmate and experienced *pro se* litigator, against a District of Columbia prison administrator, Patricia Britton. Crawford-El alleges that Britton violated his constitutional rights and seeks damages against her personally.[1/] He alleges that Britton injured him when,

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[1/]The action was also brought against the District of Columbia on the grounds that it had delegated policy-making authority to Ms. Britton. See the Fourth Amended Complaint in the Appendix to Petition for Certiorari ("Pet. App.") 192a, ¶50. The court of appeals has remanded that claim for a determination of "whether a

(continued...)

while he was being transferred through a series of different prisons to a federal facility in Florida, she refused to forward to him three boxes of his property, containing primarily legal documents and law books, but instead gave them to his family. Crawford-El received the boxes about a month after he asked his mother to forward them to him. The injuries that he allegedly suffered were the cost of postage for mailing these boxes (which he paid); the expense of purchasing "underwear, tennis shoes, soft shoes and other items;" and mental distress. Pet. App. 190a-191a.

Crawford-El alleges that Britton "diverted" his property from him in this way in order to punish him for previous exercises of his rights under the First Amendment. She allegedly did this with full knowledge of -- indeed, allegedly because of -- his penchant for suing prison officials, including her. Pet. App. 189a, ¶41(a). Crawford-El sought half a million dollars in damages from Britton -- half, compensatory, and half, punitive. J.A. 16.[2/] Britton has asserted a qualified immunity defense.

After long and complicated proceedings, Crawford-El's complaint was dismissed in the district court on the ground that he had not alleged "direct evidence" necessary to defeat an assertion of qualified immunity. Pet. App. 129a. On appeal, the D. C. Circuit convened *in banc* to review that

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[1/](...continued)
municipal policy or custom has caused a constitutional violation" here. Pet. App. 98a-99a.

[2/]In his first amended complaint, he modified his prayer to a total of $100,000. Joint Appendix ("J.A.") 49. In his current complaint, he omits reference to specific amounts. Pet. App. 193a.

issue.[3/] It held that direct evidence was not required, but that in order to overcome a qualified immunity defense, a plaintiff alleging a motive-based constitutional tort must demonstrate on summary judgment that his claim is supported by clear and convincing evidence. This Court has granted certiorari to review that ruling.

A. THE RELEVANT FACTS

Petitioner Leonard Rollon Crawford-El is serving a life sentence for murder. Pet. App. 3a. At the time he brought this action in 1989, he had been incarcerated in the District's facilities at Lorton, Virginia, since at least 1985. Pet. App. 175a, ¶6.

Crawford-El regularly filed *pro se* actions in federal court. *Id.* at 179a, ¶14 (listing cases). See also Pet. App. 72a n.1 (Henderson, J., concurring below) (listing cases brought by Crawford-El and noting that none had merit). He also sued regularly in local court when he lost personal property. Pet. App. 178a-179a, ¶13; 183a, ¶23.

In December 1988, due to overcrowding in the District's prison system, Crawford-El was transferred to the Spokane County Jail in Washington State, and subsequently to the Washington State prison system. J.A. 11; Pet. App. 179a. At the end of July 1989, Crawford-El began a series of four transfers which took him through five different institutions within 60 days, and eventually brought him to a federal

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[3/]See *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1994), *vacated* 515 U.S. 321 (1995).

facility in Florida at the end of September.[4] Ms. Britton made decisions concerning the transfer of Crawford-El and other District prisoners as part of her duties as Coordinator of Special Projects for the Department of Corrections. J.A. 10; Pet. App. 174a, ¶4.

During these transfers, Crawford-El heard that Ms. Britton had called the relatives of several other prisoners and asked them to take the prisoners' property. *Id.* at 184a, ¶28. Crawford-El called his parents, who told him that his brother-in-law, Jesse Carter, a D.C. Corrections employee, had picked up Crawford-El's property. *Id.* He then called Carter, who confirmed that he had done so, at Britton's request. *Id.* at 185a, ¶29. Carter gave the property to Crawford-El's mother. *Id.* After numerous attempts to have the D.C. Department of Corrections take back his property and mail it to him, Crawford-El had his mother mail it to him in Florida. *Id.* at 185a-188a, ¶'s 30-37.

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[4]On July 28, Washington State prison officials told Crawford-El that he would be returned to the District's prison at Lorton, Virginia. Pet. App. 181a; J.A. 11. On August 9, he was transferred, with other District prisoners, to the Western Missouri Correctional Center in Cameron, Missouri. Pet. App. 182a, ¶20. That prison could not keep all District prisoners who had been sent there; District officials therefore decided to transfer Crawford-El and more than 20 others into the federal prison system. Pet. App. 182a, ¶20; J.A. 36-37. On August 19, Crawford-El was temporarily sent to the District's facilities in Lorton, Virginia, pending a transfer to the Federal Bureau of Prisons. J.A. 12, 37. On September 7, 1989, he was transferred to the Federal Correctional Institution at Petersburg, Virginia, pending further transfer within the Federal Bureau of Prisons. Pet. App. 184a, ¶26; J.A. 13. On September 25, he was transferred from Petersburg to the Federal Correctional Institution in Marianna, Florida, for permanent assignment. J.A. 19.

Britton appears to have given Crawford-El's boxes to Carter by mid-September 1989. J.A. 27. Carter promptly transferred them to Crawford-El's mother. Pet. App. 184a-185a, ¶'s 28, 29; J.A. 19. Crawford-El did not permit his mother to forward them to him until the end of January 1990 (J.A. 40) and he received them in February 1990. Pet. App. 188a, ¶37.

B. THE LITIGATION

Because of the delay in receiving his property, Crawford-El brought this action for damages against Britton and the District of Columbia. He also served Britton with discovery requests, seeking extensive information about her employment history and private life.[5] Britton filed a motion to dismiss, attaching her affidavit J.A. 36-40.

Britton's affidavit stated her reasons for handling Crawford-El's property as she did. In effecting the transfer of prisoners from Washington State, she had decided that all the transferring prisoners' property should be sent to her

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[5]He served interrogatories and a request for production of documents. J.A. 28-35. Among other things, the interrogatories (J.A. 31-35) asked Britton to state her marital status and number of children; her place of residence for the past 10 years; her full educational history; her jobs during the past 10 years, together with her reasons for changing them; whether she had ever been arrested or convicted of any offense, including traffic offenses; whether she was ever reprimanded or transferred "in connection with any implication of wrong doing [sic] or inappropriate action on your part while performing . . . your job . . .." (J.A. 32); and much more. The request for production (J.A. 28-30) sought all lawsuit pleadings naming Britton as defendant; all her employment records; and all inmate complaints or grievances filed against her, among other things.

office in the District of Columbia to "minimize the possibility of its being lost." J.A. 37, ¶5. Crawford-El's property had not arrived at her office until after he had left Lorton. *Id.* at ¶7. By that time, District officials had been told by federal authorities that they would not accept the personal property of D.C. prisoners. *Id.* at ¶8. Britton therefore asked Crawford-El's brother-in-law Carter if "he would take plaintiff's boxes to Mr. Crawford-El's family." *Id.* at 37-38, ¶9. Britton's decision to give Crawford-El's property to his family was not unique to him. She also wrote to other inmates at this time stating that the federal prison authorities would not take their property and asking them to designate someone to whom it could be sent. J.A. 71, 72.[6/]

Crawford-El himself established the governing federal policy concerning the personal property of inmates transferring from D.C. prisons. He attached to his counter-affidavit, D.C. Cir. docket no. 17, a letter that a federal prison official, Mr. Wise, had written to Lorton officials "as clarification relative to DCDOC inmates who transfer to BOP custody." J.A. 52.[7/] Clarification was needed due to "significant differences between DCDOC and BOP property policies and differences between individual BOP facilities." *Id.* See also Pet. App. 188a, ¶35. According to Mr. Wise,

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[6/]The other inmates were James Neal and Richard Ashford. Neal had four boxes of personal property. J.A. 55. While it is not clear how much property Ashford had, he had property shipped from two different locations in the State of Washington. *Id.*

[7/]Judge Williams' opinion mistakenly recites that the Wise letter was "a copy of a letter from the [District of Columbia] Corporation Counsel's office . . .." Pet. App. 32a. However, Mr. Wise's job was "Administrator, Correctional Programs Branch, Bureau of Prisons." J.A. 50. See also Pet. App. 187a, ¶35.

the general rule is that "inmates transferring from DCDOC to BOP custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents." *Id.*

Crawford-El's property was not a small amount; it consisted of "3 very heavy boxes loaded with legal materials and law books." J.A. 47. The boxes also contained personal items, including "underwear, tennis shoes, soft shoes, [and] cosmetics . . .." *Id.* Crawford-El alleged that this material "was the sum total of seven years of his life in prison. All of it accumulated over years . . .." *Id.* at 15. Furthermore, Crawford-El was aware that i) federal policy varied among federal facilities and ii) the Marianna policy would not likely permit him to receive all his property.[8/]

Nevertheless, Crawford-El alleged in this action that the short delay in receiving his property resulted from improper motivation on Britton's part. His original theory was that Britton had deprived him of his three boxes in order to obstruct his access to the courts and impair his ability to prosecute and assist with his ongoing litigation. J.A. 15. When he was required to specify any action in which his litigation was impeded, he alleged that the diversion of his legal materials had resulted in the dismissal of one of his federal *pro se* actions. However, that was demonstrably false;

[8/]Crawford-El attached to his original complaint a letter (J.A. 19-20) stating that "the property [o]fficer here has explained that I may keep all of the property contained [in my boxes] *that is approved for this F.C.I.* [Federal Corrections Institution]." J.A. 20; emphasis supplied. The same letter continued "*Nearly all of the property I have in those boxes will be accepted* and that which is not I am informed will be mailed to the person of my designation." *Id.*; emphasis added.

the suit in question had not been dismissed until well after he recovered those materials. Pet. App. 158a-159a.

Crawford-El added the allegation that Britton's "diversion" of his boxes constituted unlawful retaliation against him for exercising his First Amendment rights. *Id.* at 147a. Specifically, he made new allegations that i) because he had caused Britton unwittingly to approve a visit by a Washington Post reporter in 1986, she had then "promised to make his incarceration as hard on him as possible," J.A. 45, ¶'s 8 & 9, and ii) Britton had told Spokane jail officials in 1988 that Crawford-El was a "legal troublemaker." *Id.* at ¶10. See also Pet. App. 181a, ¶17.[9/]

On the basis of the record before it, the district court dismissed all of Crawford-El's claims.[10/] It dismissed his First Amendment retaliation claim because he had not alleged the kind of "direct evidence" of unconstitutional motivation required by *Siegert v. Gilley*, 895 F.2d 797, 800-802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226, 231 (1990). Pet. App. 129a. The D.C. Circuit upheld the dismissal of most of Crawford-El's claims, but convened *in banc* to

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[9/]These allegations were added expressly "to comply with *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), and to allege direct evidence of defendant Britton's unconstitutional intent." J.A. 42.

[10/]The record before the court included Britton's affidavit, and other matters outside the pleadings, on which she relied in her memorandum in support of the motion to dismiss (See D.C. Cir. doc. no. 84), as well as two letters (J.A. 71, 72) outside the pleadings on which Crawford-El relied (see D.C. Cir. doc. no. 85). Thus, the proceedings were converted to summary judgment. Fed. R. Civ. P. 12(b).

consider the disposition of his First Amendment retaliation claim.

C. THE *IN BANC* DECISION

The D.C. Circuit held that, in order to defeat a claim of qualified immunity in a case that turns on the defendant's motive, the plaintiff must establish the proscribed motive by clear and convincing evidence. Pet. App. 16a-18a. (Williams opinion). It held further that the plaintiff is not entitled to discovery to oppose a motion for summary judgment based on qualified immunity unless there is a reasonable likelihood that the discovery he seeks will support his specific allegations concerning the defendant's motive, and that, so supported, his evidence will meet the clear and convincing standard. Pet. App. 63a (Ginsburg opinion).

The opinion of the court was authored by Judge Williams. His opinion recognized that in determining the standards applicable to Crawford-El's complaint, the courts must be mindful of the competing goals weighed by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and by the rule of law established in *Harlow* to protect the qualified immunity of public officials such as Britton. Thus, in *Harlow*, Judge Williams noted, this Court balanced the need to vindicate constitutional rights against the need to protect officials from exposure to discovery, trial, and damages that would both divert them from their duties and "unduly chill their readiness to exercise discretion in the public interest." Pet. App. 3a.

Harlow, Judge Williams noted, had found that claims turning on public officials' subjective intent could rarely be disposed of on summary judgment and that discovery and trial over such intent could be "peculiarly disruptive of effective government." Pet. App. 6a (*quoting Harlow*, 457 U.S. at

817). Moreover, Judge Williams noted, the *Harlow* Court had recognized that the constant threats of such claims would "dampen the ardor" of public officials in the "discharge of their duties." *Id.* (*Harlow*, 457 U.S. at 814 (quoting Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). As a result, Judge Williams wrote, this Court in *Harlow* concluded "that qualified immunity could be penetrated only on a showing of objective unreasonableness" and that such a showing had to meet a rigorous standard of proof: a plaintiff had to prove not merely that an official's conduct violated the law, but that the law was "clearly established at the time [the] action occurred." Pet. App. 6a-7a (citing *Harlow*, 457 U.S. at 817-818).

Unfortunately, Judge Williams pointed out, even though the *Harlow* Court had hoped its adoption of a rigorous objective standard would have "purged [the] qualified immunity doctrine of its subjective components," in practice that has not happened. Pet. App. 7a (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985)). And this case illustrates why. It is easy to see, as Judge Williams wrote for the *in banc* court, that if Britton deliberately diverted Crawford-El's property in retaliation for his exercise of First Amendment rights, such a diversion would violate "clearly established" law within the meaning of *Harlow*. Pet. App. 27a. But that does not resolve how Britton's alleged improper intent should be adjudicated.

After canvassing the D.C. Circuit's efforts over 12 years to establish standards for adjudicating such an alleged intent (*id.* at 8a-12a), Judge Williams concluded that a fresh approach was needed. He observed that unconstitutional motivation is "easy to allege and hard to disprove." *Id.* at 17a. He also noted that *Harlow* had determined that the costs to the public of failing to resolve promptly damages actions

against officials are high; indeed, they are so high that they warrant termination of any claim where an official's conduct was not objectively unreasonable under "clearly established" law. *Id.* at 18a.

Judge Williams also observed that, when ordinary rules of litigation have been found to threaten important public policies, a standard judicial response has been to adjust the burden of proof that applies, and that an adjustment employed in a variety of circumstances is to require clear and convincing evidence. *Id.* He found that standard to be appropriate in determining whether an official is entitled to qualified immunity in motive-based cases.[11/] In fact, as Judge Williams explained, the "clear and convincing" standard is consistent with, and follows logically from, the "clearly established" standard in *Harlow*. Both standards are designed 1) to protect public officials from unjustified interference, and 2) to err on the side of protecting these officials when there is doubt about the legitimacy of claims against them. Pet. App. 19a-21a.

[11/]Indeed, Judge Williams notes that in establishing a clear and convincing burden of proof in defamation cases against public officials *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964), explicitly drew upon the reasoning of *Barr v. Matteo*, 360 U.S. 564 (1959). *New York Times* "recited *Barr's* entire litany of social costs of officer liability -- essentially those later invoked in *Harlow* -- as a parallel justifying the adoption" of a clear and convincing standard of proof. Pet. App. 21a. He concluded that just as a clear and convincing burden of proof is appropriate in public figure defamation cases, it is equally sound for personal damages cases against public officials involving motive-based constitutional torts. *Id.*

On the related issue of protecting officials from disruptive discovery, Judge Ginsburg's opinion is controlling. *Id.* at 34a. He reasoned that, in assessing whether to stay a motion for summary judgment pending discovery, a district court abuses its discretion if it "fails duly to consider . . . the social costs associated with discovery . . . against a government official." *Id.* at 62a. These costs "as *Harlow* teaches, weigh[] heavily against discovery." *Id.* at 63a. Therefore, faced with a motion for summary judgment, a plaintiff may obtain discovery only if the particular information he seeks will likely permit him to establish impermissible motive under the clear and convincing standard. Pet. App. 63a-64a.

Applying these criteria, Judges Williams (Pet. App. 28a-34a) and Ginsburg (*Id.* at 66a-71a) painstakingly considered Crawford-El's evidence and concluded that, without more, summary judgment should be entered against him under a clear and convincing standard. Nevertheless, because this standard had not been in force previously, the majority remanded the case to allow Crawford-El a further opportunity to adduce evidence. Pet. App. 34a.

Judge Silberman, writing only for himself urged a different approach. He would require that, where a defendant offers an objectively reasonable explanation for the conduct challenged as unlawfully motivated, the official's action should be immune unless the plaintiff can impeach that reason through objective evidence. Thus, after a defendant states her reason, whether the defendant prevails should turn, not on any inquiry into whether she was actually so motivated, but on whether the reason stated is "objectively reasonable under the circumstances." Pet. App. 49a. "[O]nly an objective inquiry into the pretextuality of the reason is allowed." *Id.* at 46a. Such an objective inquiry should be conducted "without regard to [the defendant's] actual intent." *Id.* at 50a. Instead, the

factfinder should ask whether a hypothetical official would have been acting reasonably under the circumstances shown by the plaintiff if such an official were motivated by the stated reason in those circumstances. *Id.* at 49a. Under Judge Silberman's approach, therefore, to avoid summary judgment, the plaintiff must create a dispute of fact about whether a hypothetical official could have acted reasonably if he had acted for the reason posited. *Id.*

Judge Silberman found Judge Williams' approach preferable to that of Judge Edwards. Pet. App. 45a. Judge Silberman also agreed with Judge Ginsburg concerning limiting discovery.[12/]

Judge Edwards, speaking for five judges (Pet. App. 78a), would hold that no heightened standard should be applied under *Harlow* at all. And, in his view, Crawford-El's case was sufficient to withstand a motion for summary judgment and to go to a jury. *Id.* 92a- 94a.[13/]

[12/]Judge Silberman agreed with Judge Williams as to the limited extent to which discovery concerning state of mind is permitted (*i.e.*, to establish what the defendant knew, not why he acted). *Id.* at 45a n.9 ("I . . . agree that a plaintiff is entitled to discovery for certain other purposes.").

[13/]From his first (J.A. 16) to his last (fourth amended) (Pet. App. at 194a) complaint, Crawford-El demanded a jury trial.

SUMMARY OF ARGUMENT

Harlow v. Fitzgerald recognized that permitting lawsuits seeking damages personally against government officials because of their allegedly improper motives entails substantial costs to effective government. These costs include the diversion of public officials from their duties while answering discovery and preparing for, and participating in, trial; heightened risks that juries will award damages on unfounded claims; and severe inhibitions placed on public servants by such diversions and risks. As a result, the *Harlow* court defined a qualified immunity for public officials that required claims to be tested by a rigorous objective standard: only if a plaintiff could show that the alleged wrongdoing violated "clearly established" law could a claim proceed.

In the 15 years since *Harlow* was decided, the courts have wrestled with the problem of how to implement that decision in cases where an official's conduct is alleged to be unlawful solely because of his motive. The D.C. Circuit has now decided that the best way to do so is to require plaintiffs who allege such claims to overcome an assertion of qualified immunity by clear and convincing evidence.

For three reasons, the D.C. Circuit's adoption of a clear and convincing standard is the most sensible application of *Harlow* to motive-based cases. First, that standard will ordinarily permit the prompt termination of nonmeritorious claims, while permitting those supported by substantial evidence to proceed. Second, the standard strikes the same balance *Harlow* did, preferring to protect public officials from the disabling effects of numerous insubstantial claims, even at the risk that a few meritorious claims will be cut short. Finally, the more rigorous "clear and convincing" standard mirrors *Harlow*'s "clearly established" standard, and does so

to protect the same values, and to give the same benefit of the doubt to public officials, reflected in *Harlow*.

However, the clear and convincing standard on summary judgment cannot alone effectuate *Harlow*. The D.C. Circuit held that a district court should deny discovery except when the evidence sought is reasonably likely to provide the plaintiff with the necessary quantum of proof to prevail on his claim. Such a limitation follows from *Harlow*, and should be effected by the district courts to the protect the public policies identified in that case.

None of the objections made to the D.C. Circuit's effectuation of *Harlow* has merit. The claim that ordinary procedural rules should have governed the case ignores the special protections required by *Harlow* to protect the public interest. "[T]he qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large . . .." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). The claim that only standards recognized at common law are permissible here was rejected by *Harlow* itself. And the contention that the D.C. Circuit's standard created a special rule for motive-based cases is simply incorrect; in fact, the D.C. Circuit's rule is the most sensible effectuation of *Harlow* and is fully consistent with the balance struck in that case. The rule should therefore be upheld by this Court.

ARGUMENT

THE CLEAR AND CONVINCING STANDARD, COUPLED WITH RIGOROUS DISCOVERY REQUIREMENTS, CONSTITUTES THE MOST SENSIBLE APPLICATION OF *HARLOW* TO MOTIVE-BASED TORTS .

INTRODUCTION

In *Harlow*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Moreover, "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Id.*

Unfortunately, as this case illustrates and as Judge Williams' opinion explains, it is not clear how *Harlow* applies "across the board" where, as here: a plaintiff alleges that official conduct was improperly motivated; the official denies that improper motivation and offers an objectively reasonable explanation for her conduct; but the plaintiff still insists on full-blown discovery regarding her motives and insists that he is entitled to a jury finding regarding those motives.

Judge Silberman thought that, under *Harlow*, a defendant's objectively reasonable explanation for her conduct was enough to immunize her from further inquiry and to require entry of summary judgment in her favor. Pet. App. 48a-52a. Chief Judge Edwards thought, much to the contrary, that a defendant's objectively reasonable explanation gained

her nothing and that, provided plaintiff could produce "nonconclusory allegations of evidence" of defendant's unconstitutional intent, he was entitled to proceed with discovery and trial as in any other case. Pet. App. 84a (*quoting Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)). In other words, Chief Judge Edwards thought *Harlow* had little, if anything, to say about the standard that should apply here.

Judge Williams, between the two, thought it followed from *Harlow* that some kind of heightened standard had to be applied to one in Crawford-El's position, else the balance struck in *Harlow* would be undone and the values it sought to advance would go unprotected. He therefore concluded that the readily available "clear and convincing" standard, which had been applied by the courts in analogous circumstances and which was substantively close to the "clearly established" standard *Harlow* had already adopted, should be applied here.

While a case can be made for Judge Silberman's view, his approach may not sufficiently protect meritorious claims against public officials who, even though they articulate an objectively reasonable explanation for their conduct, in fact were motivated by an unconstitutional animus. At the same time, where such officials do articulate an objectively reasonable explanation, we believe Judge Williams is right that only a plaintiff's clear and convincing showing of improper intent should be enough to survive summary judgment. We also believe that Judge Ginsburg is right that discovery should proceed against such a defendant only on a plaintiff's showing of a "reasonable likelihood" that the requested discovery will lead to evidence sufficient to meet the clear and convincing standard. We therefore urge this Court to uphold Judge Williams and Ginsburg on those two points.

We present our support for this position in three parts. First, we reiterate the key components of *Harlow* that are pertinent to the questions presented. Second, we explain how the "clear and convincing" standard of proof and the "reasonable likelihood" standard of discovery effectively implement *Harlow*. And finally, we answer the objections to those standards offered by Crawford-El, his amicus, and the dissenting opinion below.

A. *HARLOW* WAS BASED ON THE SUBSTANTIAL PUBLIC INTEREST IN PROTECTING PUBLIC OFFICIALS FROM SUIT.

As noted, *Harlow v. Fitzgerald* substantially reformulated the law of qualified immunity for government officials. It did so because "substantial costs attend the litigation of the subjective good faith of government officials." 457 U.S. at 816. *Harlow* identified three such costs.

The first cost is simply the burdensome nature of litigating motive, both through discovery and at trial. "Judicial inquiry into 'subjective motivation' may entail broad-ranging discovery . . .." *Id.* at 817. This is because "there often is no clear end to the relevant evidence . . .." *Id.* As a result, such discovery is often "wide-ranging, time-consuming and not without considerable cost to the official involved." *Id.* at n.29 *quoting Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided Court*, 452 U.S. 713 (1981). "Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. Moreover, this disruptive effect is magnified by the difficulty of dismissing insubstantial lawsuits without trial. This is because

"questions of subjective intent . . . rarely can be decided by summary judgment." *Id.* at 816.

The second significant cost associated with claims of wrongdoing against government actors is "the risk imposed upon political officials who must defend their actions and motives before a jury." *Harlow*, 457 U.S. at 814 n.23. That risk, the *Harlow* Court explained, is that political officials even when acting in utmost good faith, are all too readily disbelieved: "[A]s the Court observed in *Tenney*: 'In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.'" *Id.* (*quoting Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)). This is exacerbated by the fact that, as pointed out by Judge Williams, "unconstitutional motive is . . . easy to allege and hard to disprove." Pet. App. 17a.

The final significant cost is a product of the first two: the constant diversion from performance of duties, and the risk of financial penalty for unfounded claims of wrongdoing, will not only deter "able citizens from acceptance of public office," *Harlow* 457 U.S. at 814, but for those who do accept, "the fear of being sued will 'dampen the ardor of all but the most resolute or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.*, *quoting Gregoire v. Biddle*, 177 F.2d 579 at 581. This last cost is even clearer now than when *Harlow* was decided. As one commentator has summarized the evidence:

> Aversion to the risk of a lawsuit increases as the individual defendant occupies a decreasingly significant position and presumably has little wealth. Yet low level officials are the ones increasingly being sued in their individual capacities for constitutional torts. *The "street-*

> *level" public official will go to great lengths to avoid the personal calamity of being named as the defendant in a lawsuit, and such an official is well situated to engage in self-protective strategies*, such as inaction, delay, formalism, and substitution of low risk acts for higher-risk acts.

William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1160 (1996) (footnotes omitted; emphasis added).

Thus, the special costs of litigating officials' motives are: a) the greatly increased burdens of litigation; b) the enhanced risks of erroneous judgments against officials; and c) the consequent deterrence of officials from doing their jobs responsibly and effectively caused by fear of lawsuits and their attendant burdens and risks. Significantly, these are costs "not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. And, as a result of these costs, safeguards are necessary to ensure that "public officials are able to act forcefully and decisively in their jobs." *Wyatt v. Cole*, 504 U.S. at 168.

B. THE "CLEAR AND CONVINCING" STANDARD BEST IMPLEMENTS *HARLOW*.

After considerable trial and error, the court below in this *in banc* case has reached what we consider to be the best effectuation of *Harlow* in motive-based tort cases. To see why that is so, it is worth reviewing the previous efforts to implement *Harlow*.

Prior to *Harlow*, an official accused of a constitutional violation was immune from personal liability unless *either* he knew or reasonably should have known that his conduct would violate the plaintiff's constitutional rights *or* he took the action with the malicious intention of causing constitutional injury. 475 U.S. at 815. In other words, the immunity defense had both an objective and a subjective component.

Harlow, however, theoretically "purged immunity doctrine of its subjective component[]. . .." *Mitchell v. Forsyth*, 472 U.S. at 517. Henceforth, the test was to "focus[] on the objective reasonableness of an official's acts." *Harlow*, 457 U.S. at 819. In order to defeat the assertion of qualified immunity, a plaintiff could no longer prove that the official acted in bad faith. "[S]ubjective beliefs . . . are irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Instead, the plaintiff had to show that the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Furthermore, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818.

A straightforward reading of *Harlow* would foreclose entirely any inquiry into an official's state of mind even in motive-based cases. *Halperin v. Kissinger*, 807 F.2d 180, 185-186 (D.C. Cir. 1986), stated that such a reading would "give genuine effect" to *Harlow*'s "reliance on objective reasonableness." *See also Martin v. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) (similarly recognizing that a straightforward application of *Harlow* would preclude all inquiry into motivation). Judge Silberman argued for such a position here; *i.e.*, that an official charged with a motive-based tort would be entitled to immunity so long as the purported motivation for the official's action was objectively reasonable in the circumstances. Pet. App. 49a-50a.

Judge Silberman argues that nothing less will effectively respond to the difficulty of defeating summary judgment in motive-based cases. *Id*. at 47a. He also contends that, while his position may deter unconstitutional action by officials to a lesser extent than does the clear and convincing standard, there are other disincentives to unconstitutional actions -- ranging from damage to reputation, to discipline by employers or reduced opportunity for advancement, and including specific criminal provisions and statutory claims. *Id*. at 52a-53a. At the same time, of course, Judge Silberman's approach serves to protect all the interests, and to avoid all the substantial costs, identified in *Harlow*.

We believe Judge Silberman's arguments have force. No other position avoids entirely litigation over subjective motivation and the attendant burdens of discovery and inability to terminate claims promptly. But we do not endorse his position because we believe it could "radically alter the existing balance with respect to claims of constitutional deprivations." *Martin*, *supra*, 812 F.2d at 1433. That is to say, his approach may foreclose claims merely because the public official is able to articulate an objectively reasonable basis for her conduct.

Another approach many of the courts of appeals have tried is requiring plaintiffs to plead motive-based claims with heightened specificity, and to require their resolution on the pleadings, thus foreclosing discovery.[14/] Indeed, the D.C.

[14/]See, *e.g.*, *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-970 (4th Cir. 1992) (*in banc*); *Eddington v. Missouri Dept. of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th (continued...)

Circuit was initially among them.[15/] However, there are substantial difficulties with this approach. The most serious is that, under the Federal Rules of Civil Procedure, the pleading requirements are designed to provide sufficient notice to permit responses; they are not designed to weed out claims that are insubstantial. *See In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1546-1549 (9th Cir. 1994) (*in banc*) (arguing that the particularity requirement of Fed. R. Civ. P. 9 (b) requires an explanation of why a statement was false, but does not require the pleading of evidence from which it can be inferred that the defendant knew it was false). Indeed, in *Schultea v. Wood*, 47 F.3d 1427 (1995) (*in banc*), the Fifth Circuit points up the problem when it defines the quantum of particularity that will be sufficient to satisfy its heightened pleading standard: "The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity *to raise a genuine issue as to the illegality of defendant's conduct* . . .." *Id*. at 1434; emphasis added. But, under the Federal Rules, determining whether there is a "genuine issue as to any material fact" is specifically the function of summary judgment, and not of pleading.

Yet another response to the problem here is the D.C. Circuit's decision in *Martin v. Metropolitan Police*

[14/](...continued)
Cir. 1991); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).

[15/]*See Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984) *cert., denied*, 470 U.S. 1084 (1985) ("in cases involving unconstitutional motive, we will require that non-conclusory allegations of evidence of such intent be present in a complaint for litigants to proceed to discovery on the claim.")

Department. That decision recognized that motive-based cases require a standard providing heightened assurance that a plaintiff's claim has merit, and a concomitant restriction on the factfinder's ability to base liability on evidence that is only weakly probative. 412 F.2d at 1435-1436 (*citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) and other antitrust cases requiring enhanced proof of conspiratorial conduct). Unfortunately, some of the language in *Martin* led the D.C. Circuit to adopt a bright line test in which a plaintiff was required to produce direct, rather than circumstantial, evidence of his claim. *See, e.g., Kimberlin v. Quinlin*, 6 F.3d 789, 797 (D.C. Cir. 1993), *vacated* 515 U.S. 321 (1995). That standard, however, was deficient because "[c]ircumstantial evidence may be as probative as testimonial evidence." *Seigert v. Giley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring). The *in banc* D.C. Circuit has now rejected that standard, for that reason. Pet. App. 11a-12a (Williams opinion).

These previous efforts to find a statutory implementation of *Harlow* in motive-based cases all underscore two important points. The first is that, as Justice Kennedy pointed out in *Siegert v. Gilley*, "[t]here is tension between the rationale of *Harlow* and the requirement of malice." 500 U.S. at 235-236 (Kennedy, J., concurring). This tension makes a workable rule difficult to formulate. *Id*. The second important point is the one Judge -- now Justice -- Ginsburg made in *Martin*: that whatever rule is selected, it must recognize that the *Harlow* Court's "'strong condemnation of insubstantial suits against government officers impels the application of *a standard more demanding of plaintiffs when public officer defendants move for summary judgment* on the basis of their qualified immunity." *Martin v. Metropolitan Police Department*, 812 F.2d at 1435 (emphasis added), *quoting Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984).

We submit that the "clear and convincing" rule adopted by the *in banc* D.C. Circuit in this case is the best means of resolving the tension noted by Justice Kennedy, and of implementing the more demanding standard Justice Ginsburg concluded was necessary to protect the values articulated in *Harlow*. We say this for three reasons.

First, as *Harlow* observed, "[i]t is not difficult . . . to create a material issue of fact where . . . a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection . . . would usually, under normal summary judgment standards, be sufficient . . .." 457 U.S. at 817 n.29, *quoting Halperin v. Kissinger*, 606 F.2d 1217. Because an issue of motive can so easily be raised, the careful balance struck in *Harlow* could just as easily be destroyed if public officials had no further special protection from claims of wrongdoing once the motive issue is created. The clear and convincing standard provides such protection. It permits the prompt termination of motive-based claims with little substance, while allowing those that are supported by substantial evidence to proceed.[16/]

Second, while adjusting the standard in this way may preclude some claims which have merit, failing to do so will

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[16/]The clear and convincing evidence standard is an effective means of separating substantial claims from the insubstantial, and has long been employed for that purpose in a variety of situations. See *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 n.18 (1996) (clear and convincing standard "has traditionally been employed in cases involving civil fraud and in a variety of other kinds of civil cases . . .."), *citing* 9 WIGMORE ON EVIDENCE, § 2498 (3rd ed. 1940) (stating (at 329) that this standard "is commonly applied to measure the necessary standard of persuasion" in 10 categories of civil cases and sundry others).

permit many claims which are insubstantial to continue to burden officials, deterring them from responsibly performing their jobs, and threatening them with unjustified liability. As Judge Hand said in *Gregoire*, 177 F.2d at 581:

> There must be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed . . . wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

The best means of achieving the balance identified in *Gregoire* and *Harlow* is through the clear and convincing standard.

Finally, the clear and convincing standard is a sensible and logical extension of the "clearly established" rule adopted in *Harlow*. When the issue was objective reasonableness, the Court in *Harlow* required a plaintiff to show that a public official acted unreasonably under "clearly established" law; otherwise, the official would be given the benefit of the doubt and would be assumed to have acted in good faith. By the same token, this same official should receive the same benefit of the doubt when the issue is one of subjective unreasonableness. Unless the plaintiff shows by clear and convincing evidence that the official acted with an unlawful motive, he should be assumed to have acted in good faith.

While for all these reasons, we think the clear and convincing standard is the best implementation of *Harlow*, this

standard alone is not enough to fully implement *Harlow*. The discovery protection provided by the D.C. Circuit through Judge Ginsburg's opinion is necessary as well.

"[A]voidance of disruptive discovery is one of the very purposes of the immunity doctrine . . .." *Siegert v. Gilley*, 500 U.S. at 236 (Kennedy, J., concurring). Yet, without limits set by this Court, there is a danger that district courts will permit the very discovery burdens *Harlow* sought to avoid.

Normally, discovery is available if it is relevant to a material issue and not privileged. Fed. R. Civ. P. 26(b)(1). The district courts are given broad discretion to regulate discovery, governed generally by their assessment of whether the expense of providing it outweighs the likely benefit to the party seeking it. Fed. R. Civ. P. 26(b)(2); 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE (2nd Ed. 1994), § 2008.1 at 122. In cases involving alleged improper motivation, the courts generally exercise this discretion to provide discovery liberally. *See, e.g., Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519-1520 (10th Cir. 1995) (Individual age discrimination plaintiff given access to 400 personnel files before discovery limited). The dissenting judges below argued that precisely these principles should be applied: discovery of any evidence likely "to buttress the claim," Pet. App. 84a (Edwards opinion), limited only by the district court's broad discretion, *id.* at 83a n.5, 84a n.6.

In order to give effect to *Harlow*, however, discovery must be more limited. Judge Ginsburg attempted to formulate those limits. Under his approach, in order to obtain discovery a plaintiff must show more than that such evidence *might support* his case, but instead that the evidence he seeks, together with what he has, is *reasonably likely to establish his*

case. Pet. App. 63a. Judge Ginsburg properly held that "the district court abuses [its] discretion if it fails duly to consider not only the competing interests of the parties -- as in any civil litigation -- but also the social costs associated with discovery against a government official." Pet. App. 62a. Those social costs, "as *Harlow* teaches, weigh[] heavily against discovery." *Id*. at 63a. Discretion in discovery, as in other areas of the law, must be guided by the relevant public policies, and should not "var[y] like the Chancellor's foot." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), *quoting Gee v. Pritchard*, 2 Swanston, *403, *414, 36 Eng. Rep. 670, 674 (1818) (Eldon, L.C.). *See also*, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-419 (1978) (language of discretion does not guide its exercise; relevant policy considerations do).

To effectuate *Harlow*, therefore, the Court should adopt Judge Ginsburg's rule that discovery will not be permitted simply because evidence is relevant and material, but only if, together with what plaintiff has, it is likely to make his case. Unless such a clear restriction on discovery is adopted, the litigation burdens and delays against which the clear and convincing standard is directed will be reintroduced through discovery, and *Harlow* will be undone.

C. THE OBJECTIONS TO THE CLEAR AND CONVINCING STANDARD DO NOT WITHSTAND SCRUTINY.

Three principal objections have been raised to the clear and convincing standard: 1) Chief Judge Edwards argues that the standard is unnecessary to protect the values identified in *Harlow*; 2) Crawford-El's amicus argues that the standard is not sanctioned by history for motive-based constitutional torts; and 3) Crawford-El argues that the standard will "Balkanize"

the rule announced in *Harlow*. None of these points is persuasive.

1. Chief Judge Edwards argued below that, as a result of clarifications in the law of summary judgment since *Harlow*, "Rule 56 is now more than adequate to dispose of unmeritorious claims without . . . new evidentiary standards . . .." Pet. App. 85a.

While *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), may make it easier to obtain summary judgment when motive is at issue, the true test is how the standards are in fact applied. *See Galloway v. United States*, 319 U.S. 372, 395 (1943) ("Nor is the matter greatly aided by substituting one general formula for another . . .. The matter is essentially one to be worked out in particular situations and for particular type of cases."). In practice, in cases involving motive under ordinary standards of proof, it remains very difficult to obtain summary judgment, for the reasons stated in *Harlow*. *See generally* 10A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE (2d Ed., 1983), § 2730, 1997 Supp. at 64-80 (noteworthy post-1986 decisions involving motive denying summary judgment vastly outnumber those granting it).

Indeed, the facts of this case demonstrate that *Celotex* and *Liberty Lobby* provide *no* protection for public officers in Britton's position. For, as weak as Crawford-El's case is, the dissenters below would have denied summary judgment in the absence of a heightened standard of proof and required a jury trial of his claim. They would do so notwithstanding that:

a) The notion that Britton would choose to punish Crawford-El by giving his property to his family is manifestly

unlikely. See Pet. App. 73a. (Henderson, J., concurring) ("absurd"). Surely, if Britton had wanted to punish Crawford-El by depriving him of his property, she would have found means of doing so more certainly, and more permanently -- particularly when Crawford-El was undergoing such a complicated series of moves. Indeed, Crawford-El quotes her as saying as much to his brother-in-law Carter; namely, that she could simply "throw it in the trash." Pet. App. 186a, ¶31.

b) Britton's stated reason for refusing to forward inmates' property to their federal destinations was that she had been advised that the federal prisons would not accept it. J.A. 37; Pet. App. 185a, ¶30; 186a, ¶31. This was confirmed by Crawford-El's own evidence showing i) the federal policy was at best unclear,[17] but that ii) because it permitted only a small amount of inmate property, it surely excluded Crawford-El's three very heavy boxes. J.A. 52.

c) Crawford-El's strongest evidence that Britton's "diversion" of his boxes was nevertheless the product of a motive to punish him was evidence of her exasperation with

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[17]The letter from federal prison administrator Wise (J.A. 52) written some three months after Britton gave Crawford-El's property to his family, showed that federal policy required "clarification." It also showed why: there are "significant differences between D.C. D[epartment] O[f] C[orrections] and [federal] B[ureau] O[f] P[risons] property policies and differences among individual BOP facilities." Indeed, the letter recognized that the application of federal policy would remain unclear in particular cases: "In special cases, . . . contact individual facility . . . staff for permission prior to mailing any inmate personal property to a B.O.P. facility."

him personally in connection with his contacting the press.[18] But his own evidence showed that he was not singled out for such a "diversion;" instead Britton treated other inmates similarly, who (for all his evidence shows) were not similarly involved with the press.

Thus, the motive Crawford-El attributed to Britton was extremely unlikely; he did not present evidence that she was hostile to the more general class at which her policy-based decision was directed; and he did not impeach, but instead buttressed, her stated non-retaliatory reason.

Nevertheless, the trial judge (Pet. App. 131a) and five appellate judges (*id.* at 92a-94a) have all opined that Crawford-El's showing was sufficient to defeat summary judgment and require a jury trial. We submit that, if this kind of evidence requires a trial, that fact alone demonstrates forcefully that *Harlow* and the values it sought to protect will be undermined without an enhanced burden of proof.[19]

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[18]His best evidence of Britton's hostility was the purported 1986 statement (made years prior to the 1989 diversion of property addressed by this case) that she would "make it as hard for him as possible" because he had tricked her into unknowingly admitting a reporter. Pet. App. at 178a, ¶12. This reaction was understandable under the circumstances and hardly constitutes evidence of improper conduct on her part.

[19]Contrary to the suggestion in Chief Judge Edwards' opinion (Pet. App. 91a), there is nothing in the Federal Rules of Civil Procedure that precludes the adoption of an enhanced standard of proof. To the contrary, both *Matsushita Electric Industrial Co., Ltd.* and *Anderson v. Liberty Lobby, Inc.* involved enhanced standards of proof, and both make it absolutely clear that the burden of proof is governed by the applicable substantive law. *Matsushita, supra*, 475 U.S. at 588.

2. William G. Moore, Jr. argues (Amicus Br. at 15-16) that it is inappropriate to require a plaintiff to defeat an assertion of qualified immunity by clear and convincing evidence in motive-based cases because "there is no reason to think that in passing § 1983 Congress intended to afford public officials a special immunity against claims of unconstitutional motive." *Id.* at 15. He further asserts that "the fact that there is no common law antecedent for any special immunity for unconstitutional motive torts strongly weighs against finding congressional intent to recognize such an immunity." *Id.* This argument fails for several reasons.

First, while history is relevant to ascertain what categories of official may assert immunity defenses and whether the immunity afforded is absolute or defeasible, *Harlow* itself demonstrates that history does not define the precise contours of the qualified immunity defense. Indeed, *Harlow* "completely reformulates qualified immunity along principles not at all embodied in the common law . . .." *Anderson v. Creighton*, 483 U.S. at 645. And, as discussed, the court of appeals has shaped qualified immunity in the motive-based torts context pursuant to the same policy reasons informing *Harlow*.

Second, it is illogical to base the nature of § 1983 liability for damages against state officials on what Congress intended in 1871, when such liability was not in fact imposed until at least 1941, if not 1961. *See Monroe v. Pape*, 365 U.S. 167, 213-220 (1961) (Frankfurter, J., dissenting in part). It is also unclear what the "common law antecedents" would be to the motive-based torts enforceable under § 1983. Moreover, it is inconsistent to insist that the burden of proof utilized be that employed in analogous circumstances in 1871, while at the same time arguing (Br. at 12 n.6) that the discovery available to prosecute such claims must be different. See 6 WIGMORE

EVIDENCE (Chadbourn rev. 1976) §§ 1845, 1846, 1856-1858. (Discovery virtually non-existent at common law and quite limited in chancery).

Third, courts have applied the clear and convincing standard of proof in a variety of contexts, where important policies were deemed to warrant doing so, and did so long before 1871. *See, e.g. United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 380-382 (1887) holding that there must be clear and convincing evidence to set aside instruments of title on the ground of fraud or mistake; invoking the importance of stability of title; and relying on, among other cases, *Lyman v. United Ins. Co.*, 2 Johnson 630 (New York Chancery Ct., 1817), and *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 316 (Mass. 1871). And this Court has long employed that well-established standard to protect important public policies. *See, e.g., United States v. Iron Silver Mining Co.*, 128 U.S. 673, 677 (1888) (invoking the "presumption that all the steps required by law had been observed" and "the immense importance . . . of the stability of titles dependent on these instruments").

3. Finally, Crawford-El argues that providing special rules for motive-based tort cases would impermissibly "Balkanize" the law of qualified immunity, citing *Anderson v. Creighton*, 483 U.S. at 646. But a special rule for this particularly vexing category of cases hardly creates "exceptions at the level of detail" that would likely render "officials unable to determine if they are protected," like that proposed in *Creighton*. *Id.* To the contrary, adoption of a "clear and convincing" standard is merely a logical extension of the policy driving the "clearly established" standard adopted in *Harlow*, and is consistent with the court's intention to apply a consistent "across the board" rationale to all qualified immunity cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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October, 1997

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(13)

No. 96-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. RESPONDENT AND THE OPPOSING AMICI OVERLOOK *MT. HEALTHY BD. OF EDUC. v. DOYLE*

Britton and the opposing amici overlook that, even where evidence shows a defendant's conduct was substantially motivated by unconstitutional intent, the defendant still may obtain summary judgment by demonstrating that the same action would have been taken for a legitimate reason. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). As our opening brief noted, at 17, this Court already has recognized that "fending off baseless First Amendment lawsuits [on this ground] should not consume scarce government resources." *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996). Neither Britton nor any amicus rebuts this point.

Britton, herself, acknowledges that First Amendment retaliation claims should not be foreclosed "merely because the public official is able to articulate an objectively reasonable basis for her conduct." Resp. Br. at 22. Britton offers no objection to a requirement for an actual showing on this issue. Nor does the United States object to a requirement that an official seeking summary judgment "show that there was an objectively legitimate reason" for the challenged conduct. U.S. Br. at 19. Under *Mt. Healthy*, even a defendant who admits to having been substantially motivated by unconstitutional animus may obtain summary judgment by demonstrating that the same action would have been taken for "an objectively legitimate reason." Neither Britton nor any amicus suggests a reason why this doctrine is insufficient to protect qualified immunity.[1]

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[1] Britton never has claimed entitlement to summary judgment under *Mt. Healthy*, nor does the evidence support summary judgment in her favor. Britton says that in July she ordered the seizure of all D.C. prisoners' property in Washington State, including Crawford-El's, so

II. NEITHER RESPONDENT NOR ANY AMICUS IDENTIFIES ANY DEFICIENCY IN THE DISCOVERY OR SUMMARY JUDGMENT RULES

Both Britton and the United States argue that where qualified immunity is raised by a summary judgment motion the plaintiff should not be entitled to discovery without showing a reasonable likelihood that it will "uncover sufficient evidence to support a jury finding in the plaintiff's favor." U.S. Br. at 11; Resp. Br. at 27-28. Our opening brief at 17, however, showed that this is precisely what current law requires. Neither Britton nor any amicus has pointed to any deficiency in our specific demonstration that firm application of the civil rules is more than adequate to dispose of insubstantial claims without trial or burdensome discovery. *See* Pet. Br. at 17-18.

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that it would not become lost. She says that she refused to deliver Crawford-El's property to him in September because she believed prisoners going to federal facilities were not allowed to have any property. Assuming the initial seizure could be shown to be objectively reasonable, she has not made such a showing. And even if this point could be debated, Britton's asserted belief that federal prisoners cannot have any property was both wrong, Pet. App. 187a-188a, and not objectively reasonable. Under clearly established law, prisoners have a constitutional right to possess legal papers needed for pursuit of redress. *See* Pet. App. 153a. Admissible evidence shows that Britton knew Crawford-El's property included such papers. Pet. App. 182a. Evidence also shows that other prisoners obtained return of property Britton had ordered seized, while Crawford-El and others who had told Britton of their need to obtain their legal papers, or who had filed claim notices over Britton's videotaping of them while shackled, were denied their property. Pet. App. 184a-187a. A jury reasonably could conclude that Britton seized the prisoners' property in order to control its disposition, not to prevent its loss, that her decisions as to timing and type of disposition were substantially motivated by her hostility to "legal troublemakers," and that she has failed to demonstrate that she would have made the same decisions in the absence of this motivation.

The United States erroneously argues that plaintiffs can defeat summary judgment merely by presenting evidence supporting "weak" inferences. U.S. Br. at 18. To the contrary, plaintiffs can defeat summary judgment only if the inferences they draw from their evidence are reasonable and justifiable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The United States also complains that any one of three types of evidence ("a prior run-in, an intemperate remark, or another superficially similar case that had been treated differently") could preclude summary judgment, "regardless of how unfounded the allegations of impermissible motive" might be. U.S. Br. at 24. The government, however, cites no authority for this proposition. Petitioner is aware of none. Established law answers the government's point. If the evidence on summary judgment does not support a justifiable inference of liability, then the defendant is entitled to prevail. If the evidence does support such an inference, however, then the plaintiff's allegations cannot be said to be "unfounded." Significantly, the United States presents no argument that the evidence here is insufficient to support a finding that Britton acted with unconstitutional intent.[2]

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[2] Britton's review of the evidence, moreover, Resp. Br. at 30-31, is inaccurate. Contrary to her assertions, the evidence shows that she withheld the property of other prisoners who fall in the "general class" of "legal troublemaker." See n. 1, *supra*. She did not treat similarly all other prisoners. *Id*. With respect to her hostile vow "to do everything ... to make it as hard for [Crawford-El] as possible," and to do so "so long as [he] was incarcerated," a jury hearing the evidence properly could infer that the critical content of the prominent newspaper article, including Crawford-El's remarks, had engendered Britton's desire for vengeance and that if no article had appeared (or if it had extolled the virtues of her administration), Britton would not have felt embarrassed in front of her coworkers and would not have cared one whit about the visitor pass which the reporters had used to enter the prison.

II. NEITHER RESPONDENT NOR ANY AMICUS IDENTIFIES ANY OTHER VALID REASON FOR CHANGING THE NORMAL BURDEN OF PROOF

The United States asserts that, since criminal defendants must prove the defense of selective prosecution by clear evidence, civil plaintiffs who are innocent of wrongdoing, who have been injured by a government official, and who claim that the injury was unconstitutionally-motivated, should be required to meet the same burden. U.S. Br. at 21. To state this argument is to reject it. The interests at stake in a criminal prosecution are not comparable to those at issue in a civil First Amendment retaliation case. Nor are the interests involved here comparable to those at issue in the other types of cases cited by Britton and the United States. Resp. Br. at 33; U.S. Br. at 20.

Both Britton and the opposing amici fail to address several important interests that are at stake. None mentions the deleterious consequences that their "clear and convincing" evidence proposal would have for (1) race discrimination claims, (2) claims concerning politically-motivated covert destruction of lawful political organizations, or (3) claims that officials ruined government employees' careers in retaliation for their off-duty speeches on matters of public concern. *See* Pet. Br. at 20-21. Britton's brief avoids confronting these consequences by blithely advancing the self-contradictory assertion that "[t]he clear and convincing standard" allows claims "that are supported by substantial evidence to proceed." Resp. Br. at 25. Obviously, the clear and convincing standard would allow only claims supported by clear and convincing evidence to proceed. The standard would defeat other meritorious claims.

Nothing in Britton's brief, the brief for the United States, let alone anything in the far more general briefs of the other opposing amici, warrants the drastic change in law which the clear and convincing evidence standard would bring about.

CONCLUSION

The Court should hold that qualified immunity does not alter a plaintiff's burden of proof in First Amendment retaliation cases. The Court should embrace the opinion of Chief Judge Edwards and remand the case for further proceedings.

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(11)

No. 96-827

In the Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL, PETITIONER

v.

PATRICIA BRITTON

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

In this case, petitioner seeks damages from a public official who performs a discretionary function based on a constitutional claim that requires proof that the official acted with an impermissible intent. The United States will address the following questions:

1. Whether, in such a case, an official claiming to have acted for a legitimate reason is entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that reason, and the plaintiff fails to produce clear and convincing evidence of an impermissible intent.

2. Whether, once a defendant files a motion for summary judgment in such a case, a plaintiff seeking discovery related to the defendant's intent must produce some evidence of an impermissible intent, and show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element.

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INTEREST OF THE UNITED STATES

The United States has important interests in the law relating to qualified immunity, including the standards at issue in this case. Qualified immunity applies in civil actions against federal personnel in their personal capacities for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials in their personal capacities under 42 U.S.C. 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978). The United States often represents government employees in *Bivens* actions and has an interest in protecting such employees from meritless and unduly burdensome litigation. Approximately 500 *Bivens* cases are filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP) alone, and the vast majority of those

claims are unmeritorious. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

STATEMENT

1. Petitioner was convicted of murder and is serving a life sentence in the District of Columbia's correctional system. Pet. App. 3a. In 1989, petitioner sued respondent Patricia Britton, a District of Columbia correctional official, alleging that she had violated his right of access to the courts by misdelivering several boxes containing his legal papers and other personal items. *Ibid.* Petitioner sought damages from respondent under 42 U.S.C. 1983, which provides in relevant part that "[e]very person who, under color of any [law] * * * of * * * the District of Columbia, subjects * * * any * * * person * * * to the deprivation of any rights * * * secured by the Constitution * * * shall be liable to the party injured."

The district court denied respondent's motion to dismiss and for summary judgment on qualified immunity grounds. Pet. App. 3a. The court of appeals reversed, holding that petitioner had failed to plead sufficient facts to put respondent on notice of the nature of his claim. The court remanded to permit petitioner to file a more specific complaint. *Id.* at 3a-4a.

2. On remand, petitioner filed a Fourth Amended Complaint, alleging an access-to-court claim and a due process claim. Pet. App. 4a. Petitioner also alleged that respondent had misdelivered his belongings in retaliation for various activities protected by the First Amendment. *Id.* at 28a-29a. The First Amendment claim is the only one at issue here.

With respect to that claim, petitioner alleges that, from October 1985 to April 1986, he had frequent contact with

respondent, and that she was hostile to him because he had assisted many inmates in filing administrative complaints. Pet. App. 29a. In April 1986, petitioner invited Washington Post reporters to visit him, and respondent approved petitioner's visitation request. *Ibid.* Naming petitioner as a source, the Post then published an article critical of Lorton prison conditions. The next day, respondent allegedly told petitioner that he had "tricked" her into approving the visitation request, and that she was going to do "everything she had to to make it as hard for him as possible." *Ibid.*

Between April 1986 and December 1988, petitioner filed several lawsuits against the District of Columbia. Pet. App. 30a. In December 1988, while the suits were pending, petitioner and some other inmates were transferred to the County Jail in Spokane, Washington. *Ibid.* During the transfer, prisoners were videotaped. When petitioner protested the taping as an invasion of privacy, respondent allegedly said, "[y]ou're a prisoner, you don't have any rights." *Ibid.*

Shortly after arriving in Spokane, petitioner spoke to a Washington Post reporter, and the Post published an article, quoting petitioner, that was critical of the transfer of D.C. inmates to Spokane. Pet. App. 30a. After publication of the article, respondent allegedly told an official of the Spokane County Jail that petitioner was a "legal troublemaker." *Ibid.*

Petitioner was then transferred from the Spokane County Jail to Lorton prison. Pet. App. 30a-31a. On his way back to Lorton, petitioner allegedly told respondent that he had turned over property to officials in Spokane that contained his legal papers. *Id.* at 31a. Petitioner alleges that respondent told him that the property would be sent to her. *Ibid.* When he returned to Lorton, peti-

tioner allegedly wrote a letter to respondent asking for the return of his property. *Ibid.*

Petitioner was then transferred from Lorton to a federal prison in Marianna, Florida. Pet. App. 31a. En route to Marianna, petitioner allegedly learned that some inmates returning from Spokane had received their property, and that respondent had called relatives of other inmates asking them to pick up inmate property because otherwise she would throw it away. *Ibid.* When petitioner called his mother, she told him that his brother-in-law had picked up his property, which allegedly upset petitioner because he believed he would have difficulty retrieving his property once it left the prison system. *Id.* at 32a.

According to petitioner's complaint, respondent told petitioner's brother-in-law that she was concerned that petitioner's property would be lost if she sent it to the Lorton Property office for mailing to petitioner and that federal prisons would not accept shipments of D.C. prisoner property. Pet. App. 32a. Respondent also allegedly told petitioner's brother-in-law that petitioner should be happy that she did not throw his property in the trash. *Ibid.* Petitioner's mother eventually sent petitioner's property to him at the Marianna, Florida prison. *Id.* at 32a-33a. Petitioner alleges that he had some difficulty obtaining the property because it had arrived outside prison channels. *Id.* at 33a.

3. The district court granted respondent's motion to dismiss the Fourth Amended Complaint. Pet. App. 115a-143a. The court held that the First Amendment claim failed to meet the District of Columbia Circuit's requirement that petitioner plead "specific *direct* evidence of intent." *Id.* at 128a (quoting *Kimberlin* v. *Quinlan*, 6 F.3d 789, 793 (D.C. Cir. 1993), vacated on other grounds, 515 U.S. 321 (1995)).

A panel of the court of appeals affirmed the dismissal of petitioner's access-to-court and due process claims, but suggested that the court consider petitioner's First Amendment claim en banc. Pet. App. 4a. The court agreed to consider that issue en banc, and ordered briefing on five questions, including whether the court should retain its "direct evidence" rule (requiring direct as opposed to circumstantial evidence of unconstitutional motive to overcome an official's qualified immunity defense), and, if not, whether there are any "alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation." *Id.* at 109a.

4. The en banc court vacated the dismissal of petitioner's First Amendment claim and remanded for further proceedings. Pet. App. 1a-95a. The court of appeals rejected its prior requirement that a plaintiff seeking damages from an official in his personal capacity must allege "direct" evidence of intent where the unconstitutionality of the official's action depends on that official's intent. *Id.* at 9a-12a (Williams, J.), 43a-44a (Silberman, J.), 58a (Ginsburg, J.), 72a (Henderson, J.). A majority of the court favored the adoption of alternative procedures that would protect defendants raising qualified immunity from the costs of litigating constitutional claims that depend on proof of the defendant's intent. *Id.* at 5a-21a (Williams, J.), 46a-50a (Silberman, J.), 58a (Ginsburg, J.), 72a (Henderson, J.).

a. In what is termed an "[o]pinion for the court," Pet. App. 2a, Judge Williams (joined by Judges Buckley and Sentelle) concluded that, "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Id.* at 3a. Judge Williams viewed such a standard as

necessary to implement the goals of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Pet. App. 2a-3a.

Judge Williams noted that *Harlow* holds that, in order to surmount a qualified immunity defense, a plaintiff must show that the "defendant's acts violated 'clearly established statutory or constitutional rights.'" Pet. App. 5a. *Harlow* thus "*excluded* liability" where the right violated was not clearly established, "even when the official acted 'with the malicious intention to cause a deprivation of constitutional rights or other injury.'" *Id.* at 5a-6a. This Court reformulated the qualified immunity doctrine in that manner, Judge Williams explained, because liability predicated on subjective intent "opened up a wide field of inquiry, often with 'no clear end to the relevant evidence' bearing on the official's 'experiences, values, and emotions,' and typically not susceptible of disposition by summary judgment." *Id.* at 6a (quoting *Harlow*, 457 U.S. at 816-817).

Judge Williams did not read *Harlow* to preclude the assertion of constitutional claims that require proof of intent as an element of the claim, because such a reading "would eliminate any damage remedy even for 'egregious wrongdoing.'" Pet. App. 11a-12a. At the same time, two factors led Judge Williams to conclude that "the standard protection of summary judgment * * * leave[s] an exposure to both liability and litigation that is impossible to square with *Harlow*." *Id.* at 17a. First, "unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove." *Ibid.* Second, the Court in *Harlow* regarded "the social costs of erroneously denying recovery" in officer suits that turn on subjective intent to be "exceeded by the combined social costs of (1) litigating and (2) erroneously affording recovery" in such cases. *Id.* at 18a. Judge Williams therefore concluded it was appropriate to impose a requirement that a plaintiff prove

unconstitutional motive by clear and convincing evidence. *Id.* at 18a-21a. Judge Williams noted that the imposition of such a heightened standard of proof was consistent with the application of that standard in several other contexts, including claims of civil fraud and defamation. *Id.* at 18a-21a.

Judge Williams also concluded that *Harlow* "allows an official to get summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue." Pet. App. 3a. Judge Williams reasoned that, "[i]f the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive." *Id.* at 13a.

b. Judge Silberman filed a concurring opinion, Pet. App. 35a-57a, concluding that, under the reasoning of *Harlow*, "when the defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed," *id.* at 46a. Under that approach, "[i]f the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity." *Ibid.*

c. Judge Ginsburg filed a concurring opinion, Pet. App. 58a-71a, agreeing with Judge Williams that a plaintiff should be required to establish unconstitutional intent by clear and convincing evidence, *id.* at 58a. Judge Ginsburg disagreed, however, with Judge Williams' view that there should be a *per se* bar to discovery on the intent issue before summary judgment. *Id.* at 58a-64a. Judge Ginsburg noted that a district court has discretion under Federal Rule of Civil Procedure 56(f) to permit discovery in response to a motion for summary judgment. *Id.* at 62a.

Judge Ginsburg concluded, however, that, "[i]n a case involving qualified immunity, the district court abuses this discretion if it fails duly to consider not only the competing interests of the parties—as in any civil litigation—but also the social costs associated with discovery had against a government official." *Ibid.* Judge Ginsburg therefore concluded that "[i]f, when the defendant moves for summary judgment, the plaintiff cannot present evidence that would support a jury in finding that the defendant acted with an unconstitutional motive, then the district court should grant the motion for summary judgment unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." *Id.* at 63a.

d. Judge Henderson filed a concurring opinion, Pet. App. 72a-77a, in which she joined in the adoption of a clear and convincing evidence standard of proof, *id.* at 72a. Judge Henderson would have disposed of the present case, however, on the ground that petitioner's "constitutional claims are frivolous" and therefore subject to dismissal under 28 U.S.C. 1915(d). *Ibid.*

e. Chief Judge Edwards (joined by Judges Wald, Randolph, Rogers and Tatel) filed an opinion concurring in the judgment to remand the case. Pet. App. 78a-95a. Chief Judge Edwards concluded that the court had no authority to impose either a clear and convincing evidence standard of proof or any limits on discovery beyond those set forth in the Federal Rules of Civil Procedure. *Id.* at 80a.

SUMMARY OF ARGUMENT

A. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court reformulated the common law qualified immunity defense in order to provide greater protection for public officials against the burdens of litigation and trial on unmeritorious claims. Under *Harlow*, officials performing a discretionary function are shielded from liability for damages when their conduct does not violate clearly established constitutional rights. *Harlow* eliminated the common law inquiry into an official's subjective good faith because too many insubstantial claims of bad faith resisted disposition through summary judgment and because that issue had led to broad-ranging discovery that was peculiarly disruptive of effective government.

Proof of an official's intent is also an element of many constitutional claims, and when the law on such claims is clearly established, *Harlow* does not by its terms preclude a plaintiff from bringing them. The protection given to public officials by *Harlow*, however, would be rendered ineffective if a plaintiff could simply allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thereby imposing on officials the very costs and burdens of discovery and possible trial on insubstantial claims that *Harlow* intended to spare them. Special standards are therefore needed to govern intent-based claims. Two rules best effectuate *Harlow*'s goal of preventing trials and burdensome discovery on insubstantial claims.

B. First, an official claiming to have acted for a legitimate reason should be entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that legitimate reason, and the plaintiff fails to produce clear and convincing evidence of some other, constitutionally impermissible intent. As *Harlow* recognized, ordinary summary judgment standards often do not provide an adequate mechanism for

screening out unfounded allegations of impermissible intent. At summary judgment, the evidence produced by the non-movant must be credited and all reasonable inferences must be drawn in his favor. Thus, even when an official can demonstrate an objectively reasonable basis for a decision, plaintiffs with insubstantial claims can often cobble together evidence that would preclude an award of summary judgment. The threat of trial and possible personal monetary liability, based upon weakly supported claims of improper intent, can easily deter officials from acting with the decisiveness and judgment required by the public good.

A heightened summary judgment standard responds directly to that concern. When officials know that they can avoid a trial and possible liability so long as they can show that it would have been objectively reasonable to have acted for a legitimate reason, and plaintiffs are unable to produce clear and convincing evidence of an impermissible intent, the danger that officials will be deterred from taking action in the public interest is vastly reduced.

The Court has the authority to impose such a heightened standard. When, as here, Congress has not specified a standard of proof, this Court has the responsibility to prescribe one. In a typical civil suit for money damages, the preponderance of the evidence standard is ordinarily chosen. When the use of that standard would jeopardize important interests, however, the Court has imposed a clear and convincing evidence standard. Because intent-based constitutional damage actions threaten important government interests, when an official demonstrates that it would have been objectively reasonable to have acted for a legitimate reason, a heightened standard at the summary judgment stage is warranted.

C. Public officials also need heightened protection against unwarranted discovery on intent-based claims. As

Harlow recognized, discovery on intent issues can result in broad-ranging inquiries that are peculiarly disruptive of effective government. We do not agree with the view of some of the judges below, however, that discovery should be precluded in all cases once a summary judgment motion is filed. That rule would threaten to choke off too many meritorious claims. Instead, once a defendant files a motion for summary judgment, a plaintiff seeking discovery should be required to produce some evidence of impermissible intent and show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element. That approach will provide adequate protection for public officials against improvident discovery while still leaving room for discovery in meritorious cases.

That approach is also consistent with Rule 56(f) of the Federal Rules of Civil Procedure, which affords a district court discretion to permit discovery prior to ruling on a motion for summary judgment. In the present context, the district court's exercise of discretion under Rule 56(f) must be informed by the concerns that animated *Harlow*, and any discovery order that fails to take into account those concerns would constitute an abuse of discretion. Federal Rule of Civil Procedure 26(b) also supports the application of the discovery standard set forth above. It provides that discovery "shall be limited" when the "burden" of discovery "outweighs its likely benefit." Once a public official files a motion for summary judgment based on an objectively reasonable ground for his conduct, unless the plaintiff can produce some evidence of impermissible intent and show that discovery is reasonably likely to uncover sufficient evidence to support a jury finding in the plaintiff's favor, the "burden" of the proposed discovery categorically "outweighs its likely benefit."

ARGUMENT

IN CONSTITUTIONAL TORT CASES IN WHICH INTENT IS A NECESSARY ELEMENT OF THE CLAIM, PUBLIC OFFICIALS SHOULD RECEIVE HEIGHTENED PROTECTION AT THE SUMMARY JUDGMENT STAGE

A. Constitutional Tort Claims That Depend On Proof Of Intent Raise Special Concerns That Justify Heightened Protection For Public Officials At The Summary Judgment Stage

1. Under 42 U.S.C. 1983, a person acting under color of state or District of Columbia law who "subjects" any person "to the deprivation of any rights * * * secured by the Constitution" is "liable to the party injured." The basic purpose of Section 1983 is "'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief." *Richardson* v. *McKnight*, 117 S. Ct. 2100, 2103 (1997) (emphasis omitted). Consistent with that purpose, Section 1983 has been construed to authorize damage actions against public officials in their personal capacities. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

On its face, Section 1983 does not create any immunities from such suits. *Wyatt* v. *Cole*, 504 U.S. 158, 163 (1992). Nonetheless, this Court has recognized a qualified immunity for public officials who perform discretionary functions when similar defendants would have enjoyed such an immunity at common law or when important public policy concerns suggest the need for such an immunity. *Richardson*, 117 S. Ct. at 2103. That recognition rests on the understanding that the Congress that enacted Section 1983 was unlikely to have intended to eliminate well-established common law immunities or to impose monetary liability on government officials when

especially important government interests would be jeopardized. *Ibid.*

The doctrine of qualified immunity seeks to balance two competing concerns. On the one hand, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). On the other hand, such suits "frequently run against the innocent" and impose serious social costs. *Ibid.* Those costs "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Ibid.* Most significant, however, "is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Ibid.* The most important goal of qualified immunity is to remove that danger, so that the fear of litigation will not deter an officer with discretionary power from acting "with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

To accomplish that goal, the qualified immunity doctrine must be framed so that officers "reasonably can anticipate when their conduct may give rise to liability for damages," and so that "unjustified lawsuits are quickly terminated." *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Insubstantial suits must be "expeditiously * * * weed[ed] out * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Qualified immunity thus incorporates "an entitlement not to stand trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). And, whenever possible, discovery should not be allowed "[u]ntil

this threshold immunity question is resolved." *Harlow*, 457 U.S. at 818.

2. In *Harlow*, the Court reformulated the common law qualified immunity defense in order to provide greater protection for public officials against the burdens of discovery and trial on unmeritorious claims. Before *Harlow*, public officials were entitled to qualified immunity from damage actions when they had "reasonable grounds for the belief [in the legality of their action] * * * coupled with good-faith belief." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978). That test frequently proved ineffective in resolving suits without a full trial because many courts did not view the question of an official's subjective good faith as amenable to disposition through a summary judgment motion. *Harlow*, 457 U.S. at 815. The inquiry into intent also raised special discovery concerns. Because the motivations of an official are inevitably influenced by the official's "experiences, values, and emotions," *id.* at 816, when intent is at issue, there "often is no clear end to the relevant evidence," *id.* at 816-817. Judicial inquiry into subjective motivation therefore can result in "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," which "can be peculiarly disruptive of effective government." *Id.* at 817.

Based on those weighty concerns, the Court in *Harlow* concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-818. Instead, under *Harlow*, government officials performing discretionary functions are shielded from liability for damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court has since described *Harlow* as

having "purged qualified immunity doctrine of its subjective components." *Mitchell*, 472 U.S. at 517.

3. Proof of an official's intent, however, is also an element of many constitutional claims, including claims of unconstitutional discrimination, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), cruel and unusual punishment, *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994), and retaliation based on the content of speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). When the law governing such intent-based claims is clearly established, *Harlow* does not by its terms preclude a plaintiff from subjecting an official who allegedly commits such a violation to a suit for damages. Such suits, however, can pose the very dangers that led the Court in *Harlow* to eliminate the subjective component of qualified immunity. The protection given to public officials by *Harlow* and related cases would be rendered ineffective if a plaintiff could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991). "[I]f by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, [*Harlow*'s] promise of a 'right not to be tried' is a hoax." *Elliott* v. *Thomas*, 937 F.2d 338, 344 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992).

That does not mean that plaintiffs should be precluded from bringing constitutional claims that depend on proof of an official's intent. Because many of the most egregious and clearly established constitutional violations are those that depend on proof of intent, that result could not be reconciled with Section 1983's basic purpose of "'deter[ring] state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights'

and to provide related relief." *Richardson*, 117 S. Ct. at 2103 (emphasis omitted). At the same time, because suits that depend on proof of intent threaten to resurrect the very state of affairs that led the Court in *Harlow* to reformulate the doctrine of qualified immunity, special standards are needed to govern intent-based claims. The difficult question is what form such protection should take. The different approaches suggested in the opinions below attest to the difficulty of that issue.

In the past, we have advocated various solutions to the problems posed by intent-based constitutional claims. In light of experience and the decision below, we now believe that two rules best effectuate *Harlow*'s goal of preventing trials and burdensome discovery on insubstantial claims, while at the same time allowing meritorious claims to proceed. First, to guard against trials on unfounded intent-based claims, an official claiming to have acted for a legitimate reason should be entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that legitimate reason, and the plaintiff fails to produce clear and convincing evidence of an impermissible intent. Second, to guard against far-reaching discovery on unfounded intent-based claims, once the defendant files such a motion for summary judgment, a plaintiff seeking discovery should be required to produce some evidence of an impermissible intent, and to show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element.[1]

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[1] Because the standards set forth above are derived from the concerns that animate the qualified immunity defense, they would apply only to damage actions against public officials in their personal capacities. No special rules should govern actions seeking prospective relief from a state official, a local official, or a local governmental entity, or damage actions against local entities. We have previously advocated a heightened pleading requirement for intent-based claims, under which the assertion of a qualified immunity defense required a plaintiff to allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of the defendant's conduct. Brief for the United States at 21, *Kimberlin* v. *Quinlan*, 515 U.S. 321 (1995) (No. 93-2068). Because the two rules we advocate above afford sufficient protection against trial and discovery on unfounded intent-based claims, adoption of those rules would render it unnecessary to impose a special heightened pleading rule for intent-based claims. This case does not raise the question whether a heightened pleading rule or some equivalent protection is necessary for the distinct purpose of permitting a court to determine whether a plaintiff seeking damages from a public official has alleged a violation of a clearly established right with sufficient particularity. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). We continue to believe that, in order for qualified immunity to be effective, some mechanism is required to ensure that the defendant is aware at the outset of the precise nature of the clearly established right he is alleged to have violated.

B. Summary Judgment Should Be Granted When A Public Official Shows That It Would Have Been Objectively Reasonable To Have Acted For A Legitimate Reason, And The Plaintiff Fails To Produce Clear And Convincing Evidence Of An Impermissible Intent

1. Section 1983 does not itself prescribe any standard of proof. In such circumstances, this Court has the responsibility to formulate one. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983); *Woodby* v. *INS*, 385 U.S. 276, 284 (1966). In exercising that responsibility in other contexts, this Court has made it clear that, "[i]n a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence." *Herman & MacLean*, 459 U.S. at 387. When the use of that standard would jeopardize important interests, however, this Court has not hesitated to impose a heightened standard. *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S.

261, 282-283 (1990) (citing cases). Because of the important governmental interests that are threatened by intent-based damage actions against public officials, when a public official asserts a qualified immunity defense and demonstrates that it would have been objectively reasonable to have acted for a legitimate reason, a heightened standard of proof at the summary judgment stage is warranted.

a. As the Court recognized in *Harlow*, ordinary summary judgment standards often do not provide an adequate mechanism for screening out unfounded allegations of impermissible intent. 457 U.S. at 815-816. Under Federal Rule of Civil Procedure 56, when a court considers a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, absent a standard of proof higher than the preponderance of the evidence standard, a plaintiff would be able to place an official's motives on trial before a jury even if the plaintiff's evidence only weakly supports an inference of improper motive, and even if all of the plaintiff's evidence is consistent with the defendant having acted with a lawful motive. As long as the plaintiff's evidence could support an inference of improper motive as well as a lawful one, the case must proceed to trial.

There are significant costs to subjecting a government official who has acted in an objectively reasonable manner to the threat of a jury trial in such circumstances. The mere prospect of a trial could adversely affect day-to-day decision-making within the government. The risks are especially great for officials in policy-making positions, because the more delicate, important, or controversial the policy decision, the greater the threat of a suit based upon weakly supported claims of improper motive becomes. "In times of political passion, dishonest or vin-

dictive motives are readily attributed * * * and as readily believed." *Harlow*, 457 U.S. at 814 n.23. The threat of trial and possible monetary liability, based upon weakly supported claims of improper intent, can easily deter officials from acting with the "decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 239-240.

The standard we advocate responds directly to those concerns. When officials know that they can avoid a trial and possible liability so long as they can show that it would have been objectively reasonable to have acted for a legitimate reason, and the plaintiff is unable to produce clear and convincing evidence of an impermissible intent, the danger that officials will be deterred from taking action in the public interest is sufficiently reduced.

b. An example helps to illuminate the difference between the ordinary standard and the standard we propose. Suppose an inmate engages in disruptive behavior in violation of a prison rule, and a prison official concludes that discipline is warranted. Suppose further that the official has had prior run-ins with the inmate, and that the inmate has filed one or more grievances relating to his treatment. Under ordinary standards, the prison official could not be sure of avoiding a trial and possible liability should he choose to initiate discipline, and that danger could easily deter the official from taking the action that the public interest requires.

Under the standard we propose, the situation is different. The official can show that there was an objectively legitimate reason for initiating discipline (the inmate's disruptive behavior), and the official could feel confident that the inmate's evidence could not be regarded as clear and convincing evidence of an impermissible intent. The danger that the official will be deterred from taking action in the public interest is therefore significantly reduced.

2. The imposition of a clear and convincing evidence standard for intent-based damage actions at the summary judgment stage is supported by the use of that standard in other, analogous circumstances. For example, this Court long ago held that claims to set aside a written instrument on the basis of fraud must be proven by clear and convincing evidence. *Maxwell Land-Grant Case*, 121 U.S. 325 (1887); *Snell* v. *Insurance Co.*, 98 U.S. 85, 89-90 (1878); *Atlantic Delaine Co.* v. *James*, 94 U.S. 207, 214 (1876). Those decisions have deep roots. The clear and convincing evidence standard arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. *Herman & MacLean*, 459 U.S. at 388 n.27. Because of the concern that such claims would be fabricated, the chancery courts imposed a higher standard of proof. *Ibid.* That rationale was then extended to all proceedings to set aside "presumptively valid" written instruments on the ground of fraud. *Ibid.*

The situation is analogous when a plaintiff seeks to challenge an objectively reasonable decision by a public official on the ground that it was motivated by an impermissible intent. Like a claim of fraud, a claim of impermissible intent focuses on a person's state of mind and is therefore peculiarly susceptible to fabrication. As Judge Williams stated (Pet. App. 17a), "unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove." Moreover, an official decision that is shown to be objectively reasonable, like a written instrument, has the hallmarks of legitimacy and therefore may be treated as "presumptively valid." The use of a clear and convincing evidence standard in the fraud context therefore supports the application of a similar standard here.

This Court has also imposed a clear and convincing evidence standard for claims of defamation by public

figures. *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). The adoption of that standard was premised on the understanding that a standard that too easily permits the recovery of damages against those who criticize public officials could dampen public debate. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964). Similar considerations support a heightened standard here. Just as the threat of damage actions can stifle public debate, the threat of damage actions can deter public officials from exercising their discretion in the public interest. See *id.* at 282 (drawing an analogy between the two situations).

3. The standard we advocate is also supported by the principle applicable in various settings that, "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Most recently, in *United States* v. *Armstrong*, 116 S. Ct. 1480, 1486 (1996), the Court applied that principle to claims of selective prosecution. There, the Court held that a "presumption of regularity" supports a prosecutorial decision, and that, "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" *Ibid.* The Court explained that prosecutors have "broad discretion" to enforce the Nation's criminal laws, and that unconstrained inquiries into the basis on which such discretion is exercised can "impair the performance" of that function. *Ibid.*

The situation is similar here. The officials at issue here perform discretionary functions, and damage actions that probe their intent for making objectively reasonable decisions can impair the performance of those functions. Thus, an official who demonstrates an objectively reasonable basis for exercising discretion should be presumed

to act in good faith and should be immune from a damage action absent "clear evidence to the contrary." *Armstrong*, 116 S. Ct. at 1486.

4. a. Petitioner's reasons for opposing a heightened standard of proof at the summary judgment stage are unpersuasive. Petitioner contends (Br. 13-14) that there is no support for a heightened standard of proof in damage actions against public officials "in the well-established common law of 1871." The common law rules on burdens of proof in existence in 1871, however, are not controlling here. Although the Court has looked to common law history in deciding who can invoke qualified immunity, *Richardson*, 117 S. Ct. at 2103, it has not limited the protections afforded by that doctrine to those available in 1871. *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). Indeed, in *Harlow*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Ibid.*

The Court has consistently attempted to define the protections afforded by qualified immunity in a manner that "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. As explained in *Harlow*, in defining the contours of the qualified immunity doctrine, "the importance of a damages remedy to protect the rights of citizens" must be balanced against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." 457 U.S. at 807. In *Harlow*, the Court held that, in order to strike the appropriate balance, qualified immunity should not be defeated by an

allegation of malice and that the immunity vests when an official has acted in an objectively reasonable manner. *Id.* at 817-818. The question here is how the balance that *Harlow* already struck should apply in the context of a cause of action that turns on an allegation of impermissible intent. Contrary to petitioner's suggestion, it is well within this Court's authority to resolve that question.

Moreover, as discussed above, because Congress has not specified the standard of proof for Section 1983 actions (or for the federal common law analogue under *Bivens*), this Court has the responsibility to prescribe one. In specifying the standard of proof when Congress has failed to do so, the Court has not rigidly followed common law practice. Instead, it has adopted the standard that best accommodates the competing interests. *Herman & MacLean*, 459 U.S. at 388-390; *Woodby*, 385 U.S. at 284-286. Petitioner's reliance on the absence of a settled common law practice requiring proof of clear and convincing evidence in cases seeking damages from public officials is therefore misplaced.

b. Petitioner also contends (Br. 14) that changes in summary judgment law since *Harlow* make it unnecessary to impose a higher standard of proof in order to weed out insubstantial allegations of intent. In particular, following *Harlow*, the Court held in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986), that summary judgment may be granted against a non-moving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, under *Celotex*, "the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage." *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring).

The same day this Court decided *Celotex*, however, it held in *Anderson* that a clear and convincing evidence

standard applies at the summary judgment stage to defamation actions by public figures. 477 U.S. at 255-256. The lesson of *Anderson* is that the protection afforded by *Celotex*, while significant, is not a substitute for a heightened standard of proof. That is true in the present context for two reasons.

First, absent a heightened standard of proof, even plaintiffs with insubstantial claims of impermissible intent can often cobble together evidence that would preclude a district court from granting summary judgment. For example, even when an official can demonstrate an objectively reasonable basis for a decision, it would not be unusual for an inmate to be able to produce evidence of a prior run-in, an intemperate remark, or another superficially similar case that had been treated differently. Under ordinary standards, regardless of how unfounded the allegations of impermissible motive, such evidence could preclude the grant of summary judgment. Thus, even with the benefit of *Celotex*, public officials will often be unable to weed out insubstantial claims at the summary judgment stage without the addition of a heightened standard of proof.

Second, in order for officials to act with the decisiveness required by the public interest, they must be able to predict with a reasonable degree of confidence when they may be subject to a trial and possible liability. *Davis*, 468 U.S. at 195. There is likely to be a significant disparity, however, in how different judges apply the summary judgment standard under the preponderance of the evidence standard. And that unpredictability would prevent officials from ever knowing when they might be subject to a trial on an insubstantial claim. This case is illustrative. Although Judge Henderson viewed the allegations of intent in this case as frivolous, Pet. App. 72a, the district court and five members of the en banc court viewed petitioner's asserted evidence as sufficient to permit a jury to infer an impermissible intent under a preponderance standard, *id.* at 93a-94a. *Celotex* simply cannot furnish the degree of predictability that is necessary to serve *Harlow*'s goals.

c. Finally, petitioner contends (Br. 10) that the adoption of a heightened standard of proof would "create, for a particular category of claims, qualified immunity that borders on absolute immunity." The clear and convincing evidence standard, however, has been applied in numerous other contexts, including in deportation proceedings, denaturalization proceedings, civil commitment proceedings, termination of parental rights, civil fraud, lost wills, and oral contracts to make bequests. *Cruzan*, 497 U.S. at 282-283. There is no evidence that the application of that standard has led to anything approaching absolute immunity in those suits.

C. A Plaintiff Seeking Discovery Should Be Required To Produce Some Evidence Of An Impermissible Intent, And Show That There Is A Reasonable Likelihood That Discovery Will Procure Evidence That Would Permit A Jury To Find In The Plaintiff's Favor

1. As *Harlow* explained, predicating liability on intent not only makes it difficult to weed out insubstantial claims on summary judgment, it also creates the potential for "broad-ranging discovery" that "can be peculiarly disruptive of effective government." 457 U.S. at 817. If a plaintiff faced with a summary judgment motion advancing an objectively reasonable basis for the conduct had an unrestricted right to seek far-reaching discovery on the intent issue—and thereby postpone the resolution of the summary judgment motion until such discovery is completed—those same concerns would arise. We do not agree with Judge Williams (Pet. App. 13a), however, that the

appropriate response is to preclude discovery in all cases until the summary judgment motion is resolved. Because critical evidence on the intent issue may sometimes be in the possession of the defendant or others, that approach would threaten to choke off too many meritorious claims. It would also create unnecessary tension with Federal Rule of Civil Procedure 56(f), which expressly gives a district court discretion to "order a continuance to permit * * * discovery to be had" when a party opposing a summary judgment motion "cannot for reasons stated [in an affidavit] present by affidavit facts essential to justify the party's opposition."

The approach we advocate is derived from Judge Ginsburg's concurring opinion below and the Seventh Circuit's decision in *Elliott*, *supra*. Once a defendant files a motion for summary judgment, a plaintiff should be permitted to obtain discovery prior to the resolution of the motion only if the plaintiff can (1) produce "some evidence" of impermissible intent, *Elliott*, 937 F.2d at 345, and (2) show that there is a "reasonable likelihood" that "discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor," Pet. App. 63a (Ginsburg, J.). Those requirements provide adequate protection for government officials against improvident discovery, while still leaving room for discovery in meritorious cases.

The requirement of "some evidence" is identical to the one this Court approved in *Armstrong* as a prerequisite to discovery on a selective prosecution claim. 116 S. Ct. at 1488. Although plaintiffs seeking discovery need not produce evidence that would itself support a jury finding in their favor on the intent issue, they must make a "substantial threshold showing" of impermissible intent. *Ibid.*

To satisfy the "reasonable likelihood" requirement, it is not sufficient to show that discovery will "buttress" the

plaintiff's claim. Pet. App. 63a (Ginsburg, J). If the requirement were framed in that way, discovery would be authorized any time the plaintiff could show a reasonable likelihood of uncovering evidence that would make the plaintiff's case marginally stronger than it was before. The standard we advocate erects a higher hurdle. The evidence sought, when combined with the evidence in hand, must be sufficient to support a jury finding in the plaintiff's favor. Nor is it permissible for the plaintiff to "paint only with a broad and speculative brush." *Ibid.* (Ginsburg, J.). The plaintiff must have a concrete basis for believing that discovery will uncover the necessary evidence.

2. The limitations on discovery we propose are consistent with Rule 56(f). While that Rule gives a district court discretion to permit discovery prior to ruling on a summary judgment motion, "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.)). Because Rule 56(f) does not itself specify the legal principles that should govern the district court's exercise of discretion, those principles must be derived from other sources. *Elliott*, 937 F.2d at 345. Here, the legal principles that govern the district court's exercise of discretion under Rule 56(f) must be informed by the concerns that animated this Court's decision in *Harlow*. As the Seventh Circuit stated in *Elliott*, "[i]f a rule of law crafted to carry out the promise of *Harlow* requires the plaintiff [to make certain showings before obtaining discovery], and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado." 937 F.2d at 345. Any district court order that fails to take into

account "the social costs" associated with discovery on intent-based claims constitutes an "abuse of discretion." Pet. App. 62a (Ginsburg, J.).

Federal Rule of Civil Procedure 26(b)(2) reinforces the conclusion that such costs must be considered. It provides that discovery "shall be limited" when the court determines that "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). Once a public official files a motion for summary judgment on an intent-based claim, unless the plaintiff can introduce some evidence of impermissible intent and show that discovery is reasonably likely to uncover sufficient evidence to support a jury finding in the plaintiff's favor, "'the burden * * * of the proposed discovery" categorically "outweighs its likely benefit."[2]

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[2] Courts applying Rules 56(f) and 26(b)(2) outside the present context have imposed limitations on the district court's discretion to permit discovery after a motion for summary judgment has been filed. See, *e.g.*, *Fennell* v. *First Step Designs, Ltd.*, 83 F.3d 526, 531 (1st Cir. 1996) (requiring a "plausible basis" for concluding discovery will raise a "trial worthy issue"); *Price* v. *General Motors Corp.*, 931 F.2d 162, 164 (1st Cir. 1991) (same). To the extent that those decisions may suggest that a district court has more leeway to permit discovery in other contexts, the special concerns articulated in *Harlow* justify the limitations we have proposed for intent-based damage actions against public officials.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1997

(3)

No 96-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS WILLIAM G. MOORE, JR. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No counsel for any party had any role in authoring this brief, and no person other than the named *amicus* and his counsel made any monetary contribution to its preparation and submission.

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INTEREST OF *AMICUS CURIAE*[1]

William G. Moore, Jr. is the former chairman and chief executive officer of Recognition Equipment Incorporated ("REI"). REI was closely involved in the decision of the United States Postal Service in the early 1980s to introduce optical scanning technology to improve the Service's performance. At that time, Moore was an outspoken critic of the Postal Service's ill-considered and since-reversed decision to use single-line technology rather than multiple-line scanners of the sort produced by REI. Partly as a result of Moore's public criticism and lobbying of Congress, several high ranking Postal Service officials were dismissed.

Several years later, after an investigation by Postal Service inspectors, Moore was charged with involvement in a conspiracy relating to kickbacks at the Service. Moore's only connection to the scheme was REI's retention, on unrelated business, of a consulting firm involved the scheme. Although none of the participants in the conspiracy said that Moore was involved — indeed, several told postal inspectors that steps had been taken to hide the conspiracy from him — the postal inspectors and the prosecutor in charge of the investigation nevertheless attempted to connect Moore to the scheme. As the subsequent trial disclosed, in order to obtain an indictment, the postal inspectors and prosecutor engaged in shocking acts of deliberate misconduct.[2] After the government presented its case for six weeks,

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[1] Counsel for petitioner and respondent have consented to the filing of this brief *amicus curiae*. Their consent letters are on file with the Clerk of the Court.

[2] Among other things, the postal inspectors and the prosecutor (1) intimidated and harassed a key witness into withdrawing exculpatory testimony; (2) presented in lieu of live testimony witness statements that were inaccurate, incomplete, and often simply false; (3) refused to permit one witness either to correct his statement or to present testimony to the grand jury that would remove the misleading impression created by the statement; (4) asked questions before the grand jury based upon factual premises known to be false; (5) knowingly concealed exculpatory evidence; (6) disclosed secret grand jury testimony to certain witnesses in order to influence their testimony; and (7) falsified records of witness

the trial court dismissed the charges as baseless. *See United States v. Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989). Nevertheless, Moore suffered grievous injury to his reputation, to his career, and to his personal life from this unfounded prosecution.

In November 1991, based upon evidence that his prosecution was in retaliation for his outspoken criticism of the Postal Service, Moore sued the postal inspectors and the prosecutor for violating his constitutional rights. On September 22, 1995, a unanimous panel of the D.C. Circuit upheld Moore's claim of retaliatory prosecution against the postal inspectors' defense of qualified immunity. *See Moore v. Valder*, 65 F.3d 189, 196 (D.C. Cir. 1995), *cert. denied*, 117 S. Ct. 75 (1996); *see also id.* at 194-95 (rejecting the prosecutor's claims of absolute immunity for investigatory functions). In so doing, the D.C. Circuit expressly held that Moore had satisfied the direct evidence standard then used by the D.C. Circuit. *See id.* at 196.

It has been more than 17 months since the D.C. Circuit issued its mandate in Moore's case. Moore has, however, been unable to conduct discovery because the postal inspectors and the prosecutor in his case have sought reconsideration of their qualified immunity claims based upon the decision below. In Moore's view, the evidence that satisfied the D.C. Circuit's direct evidence pleading standard satisfies whatever new standard *Crawford-El* imposes. The clear-and-convincing evidence standard adopted by the plurality would, however, place Moore at a decided disadvantage at trial. Moore, and all other plaintiffs with meritorious claims based upon unconstitutional motive, therefore have a keen interest in this Court's consideration — and rejection — of that evidentiary standard.

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interviews to omit exculpatory evidence.

INTRODUCTION AND SUMMARY

As Justice Kennedy has observed, there is a tension between this Court's attempt in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to purge the qualified immunity doctrine of subjective elements and the requirement for many constitutional violations that a particular purpose, intent or motive be proven. *See Siegert v. Gilley*, 500 U.S. 226, 235-36 (1991) (Kennedy, J., concurring in the judgment). Most lower courts have reconciled this tension by requiring plaintiffs to specify the facts supporting claims of unconstitutional motive and permitting defendants to move for dismissal based upon qualified immunity at that stage. Alone among all these decisions, the plurality opinion in this case went one step further and imposed a heightened evidentiary standard on plaintiffs bringing unconstitutional motive claims. *See Crawford-El v. Britton*, 93 F.3d 813, 821-23 (D.C. Cir. 1996) (plurality op.).

The clear-and-convincing evidence standard adopted by the plurality is not based on any common law antecedent. Nor is it drawn from the decisions of this Court or, for that matter, any other court. In fact, as the plurality conceded, the clear-and-convincing evidence standard was not even advocated by any of the parties before the *en banc* panel. *See Crawford-El*, 93 F.2d at 821 & n.5. The standard emerged instead from the plurality's analysis of the social costs and benefits of unconstitutional motive suits. The plurality does not, however, overcome the "burden of showing that public policy requires an [immunity] of that scope," *Butz v. Economou*, 438 U.S. 478, 506 (1978), for the simple reason that it fails to identify the public interests implicated by the immunity it proposes.

First, the plurality assumes that the net social costs of litigating claims unsupported by any clearly established right, which this Court considered in *Harlow*, are equivalent to costs of litigating cases in which an unconstitutional motive must be proven. This is not true. Where there is no clearly established right, the public's interest in holding public officials liable is limited because of the injustice of punishing officials who must exercise

discretion to perform their duties for failing to anticipate what rights courts will establish in the future. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The public's interest in punishing officials who discriminate on the basis of race, retaliate against the exercise of free speech, or otherwise act with an unconstitutional motive is far stronger. There is, moreover, nothing unfair about allowing plaintiffs to recover damages from public officials who discriminate on the basis of race or retaliate against the exercise of free speech. To the contrary, the public has a compelling interest in punishing public officials who so flagrantly abuse their office.

Second, the plurality asserts without any real analysis that unfounded claims of unconstitutional motive cannot be screened out effectively without a heightened standard of proof. As other circuits considering the issue have found, this is not so. Few, if any, unfounded claims will be able to survive dispositive motions made prior to discovery — especially if public officials who have acted in an objectively reasonably manner are permitted a presumption of good faith.

Finally, and most fundamentally, the plurality ignores the proper role of the courts in determining the nature and scope of official immunity. The role of courts is "to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *see also Butz v. Economou*, 438 U.S. at 504 (noting that immunities in *Bivens* actions are co-extensive with those under § 1983). The plurality does not, however, even inquire into Congress' intent. Congress could not have intended to expand traditional immunities to include the clear-and-convincing evidence standard proposed by the plurality below. Section 1983 was enacted in 1871 in large part to protect the rights of former slaves and more generally to provide a federal remedy against official misconduct. *See Monroe v. Pape*, 365 U.S. 167, 172-74 (1961). An immunity doctrine that offers special protections to public officials who discriminate on the basis of race or retaliate against others for exercising constitutional rights would undermine these purposes and must therefore be rejected.

ARGUMENT

I. THE PLURALITY'S WEIGHING OF THE COSTS AND BENEFITS OF UNCONSTITUTIONAL MOTIVE CASES IS FLAWED.

Two factors led the plurality to require proof of unconstitutional motive by clear and convincing evidence in order to overcome a public official's qualified immunity. *See Crawford-El v. Britton*, 93 F.3d at 821 (plurality op.). First, relying upon this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, the plurality asserted that the "costs of error in the grant or denial of relief in such cases was asymmetrical." *Crawford-El*, 93 F.3d at 821. Second, the plurality asserted that even without discovery plaintiffs would "often be able to depict a selective pattern of decisions that . . . will look fishy enough" to get them past summary judgment. *Id.* This reasoning does not even begin to satisfy the burden that must be borne to justify an expansion of official immunity, *see Butz*, 438 U.S. at 506, because, as shown below, it is based upon unjustified and incorrect assumptions.

A. The Public Has a Compelling Interest in Holding Public Officials Accountable for Their Tortious Conduct.

In finding that the costs of litigating unconstitutional motive claims outweigh the costs of denying recovery in such cases, the plurality discussed in some detail the costs of litigating such claims. *See Crawford-El*, 93 F.3d at 821-23. Notably absent from the plurality opinion is any extended analysis of the other half of the equation: that is, the public interest in holding public officials who act with an unconstitutional motive accountable for their tortious conduct. This interest — which implicates not only the rights of victims of official misconduct to compensation, but also the principle of the rule of law — is always strong. Moreover, contrary to the plurality's assumption in relying upon this Court's decision in *Harlow*, the public's interest in holding public officials accountable in unconstitutional motive cases is much stronger than its interest in the types of cases considered in *Harlow*.

1. The Public Has a Strong and Well-Established Interest in Holding Public Officials Personally Accountable for Their Tortious Conduct.

At common law, official immunity is the exception, not the rule.[3] The common-law rule that public officials should be held accountable for their torts serves several important interests. This rule ensures that victims of official conduct will be compensated for their injuries. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814 (citations omitted); *see also Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). However, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Accordingly, this Court early on recognized the importance of compensating victims of official misconduct. *See, e.g., Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242 (1812); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

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[3] As one scholar has noted, "the common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability." George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1178 (1977). Thus, in England, it has long been established that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Albert V. Dicey, *Law of the Constitution* 189 (6th ed. 1902). The same principle has been applied in the United States. *See, e.g.*, Joseph Story, *Commentaries on the Law of Agency* § 320, at 396 (1869) (noting that public officers "incur the same responsibility, and to the same extent, as private [individuals]"); *see also United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above of the law. No officer of the law may set that law at defiance with impunity.").

The rule that public officials should be held accountable for their tortious conduct also serves to define the role of public officials in a constitutional democracy. First, imposing liability helps to "deter[ ] public officials' unlawful actions." *Elder v. Holloway*, 510 U.S. 510, 515 (1994). More importantly, imposing liability on public officials also vindicates the rule of law.[4] *See Butz v. Economou*, 438 U.S. at 506 ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law"). As Justice Story observed,

> [The tort liability of public officers] is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority, or by an excess of his authority, or by negligent use or abuse of his authority.

J. Story, *Commentaries on the Law of Agency* § 320, at 396 (1869).

As the role of the government has expanded and the level of litigation in society has risen, courts began to recognize the need to shield government officers from liability for their misconduct in order to ensure the vigorous exercise of public authority. *See, e.g.*, Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 Law & Contemp. Probs. 7, 14 (1978) ("The notion that government officers should be shielded from liability is of relatively recent origin."). This does not, however, mean that the public's interest in official accountability has diminished. The need to compensate innocent victims of official misconduct remains and the importance of the rule of law have not disappeared during this century. If anything,

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[4] The Sovereign's abuse of the rule of law formed one of the key grievances in the Declaration of Independence. *See* Declaration of Independence, para. 12 (U.S. 1776) (protesting the King's "sen[ding] hither swarms of Officers to harass our people and eat out their substance").

the validity of these principles has "gained and not lost." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 n.2 (1944) (Frankfurter, J., dissenting). Consequently, these concerns have "required the denial of absolute immunity to most public officers," *Harlow*, 457 U.S. at 814, and they require federal officials seeking new immunities to "bear the burden of showing that public policy requires an [immunity] of that scope." *Butz*, 438 U.S. at 506.

2. The Public's Interest in Holding Public Officers Personally Accountable Is Especially Strong in Cases of Unconstitutional Motive.

The plurality opinion did not consider directly the public's interest in holding public officers accountable for constitutional violations arising from unconstitutional motive. Instead, the plurality reasoned that this interest was outweighed by the costs of unconstitutional motive suits because in *Harlow* this Court implicitly found that the social costs of litigation outweighed the social costs of denying recovery to meritorious plaintiffs. *See Crawford-El*, 93 F.3d at 821. Hidden in the plurality's reasoning is the assumption that costs of denying recovery in unconstitutional motive suits is equivalent to the costs of denying recovery in the suits considered in *Harlow*. That assumption is incorrect.

The paradigmatic unconstitutional motive claim is discrimination, which can only be established by showing an intent to discriminate. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 240 (1976). Discrimination, especially by public officials, eats away at the very fabric of a democratic society. As Alexander Bickel recognized,

> The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, and destructive of democratic society.

A. Bickel, *The Morality of Consent* 133 (1975). Discrimination not only injures the individual against whom it is directed; it also can stigmatize entire groups of people and distort the political process. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Plainly, the public's interest in punishing public officials who engage in discrimination and deterring others from doing so is compelling.

The Constitution also forbids public officials from depriving individuals of government benefits in retaliation for the exercise of their constitutional rights. *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government officials "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *see generally* 1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 3.11, at 208-09 & n.388 (1997). Like discrimination claims, retaliation claims require proof of a motive. *See, e.g.*, *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2352 (1996) (requiring proof that conduct "was motivated by [plaintiff's] speech on a matter of public concern"); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (discussing the framework for assessing governmental motive). The public's interest in holding accountable officials who retaliate against the exercise of constitutional rights and deterring such retaliation in the future is especially great. Officials who punish others for exercising their constitutional rights do not simply violate Constitution; they subvert it. For the rule of law to have any practical meaning, public officials who abuse their authority to prevent citizens from exercising their rights must be punished. Thus, in retaliation cases, as well as discrimination cases, the public has a compelling interest in holding public officials who act with an unconstitutional motive accountable for their actions.[5]

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[5] There are other types of unconstitutional motive claims as well. For example, plaintiffs alleging Eighth Amendment violations are required to prove deliberate indifference. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Harlow considered the immunity recognized at common law for public officials acting in good faith. *See Harlow*, 457 U.S. at 806; *Scheuer v. Rhodes*, 416 U.S. at 240. "[Inferior officers exercising severally a discretionary duty to individuals] are protected when they act in good faith but they are generally held responsible if they take advantage of their position to injure another maliciously and without cause." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 174 (3d ed. 1898). This Court held that the scope of this immunity should be judged by the "objective legal reasonableness of an official's acts." *Harlow*, 457 U.S. at 819. Thus, under *Harlow*, recovery is denied to meritorious plaintiffs only when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citations omitted). The public's interest in punishment in these cases is limited. As this Court has recognized, when the law is unclear, there is an "injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position to exercise discretion." *Scheuer v. Rhodes*, 416 U.S. at 240; *see Harlow*, 457 U.S. at 818. When the law is unclear, an official cannot "fairly be said to 'know' that the law forbade conduct not previously identified unlawful." *Harlow*, 457 U.S. at 818. Moreover, public officials cannot "reasonably be expected to anticipate subsequent legal developments." *Id.* Thus, while the public interest in punishing public officials who discriminate or otherwise act with an unconstitutional motivation is compelling, the interest in punishing officials under the circumstances considered in *Harlow* is quite limited.

The other purpose served by the qualified immunity doctrine is the "public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807 (quotation omitted); *Scheuer*, 416 U.S. at 240. It is, however, questionable how much public officials who do not and cannot know whether their actions violate a constitutional right can be deterred from violating that right. Their most likely reaction is simply not to act at all. By contrast, where the rules are clear, as with claims of

unconstitutional motive, public officials can easily act and still avoid violating constitutional rights. Moreover, to the extent that public officials hesitate before they act in order to avoid claims of unconstitutional motive, that is good. As this Court has observed, "[w]here an official could be expected to know his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quotation omitted).

In sum, the public's interest in holding public officials who act with an unconstitutional motive liable for the injuries they cause is stronger than the interest in holding liable officials who fail to anticipate future legal developments. This in turn means that the social costs of denying recovery in unconstitutional motive cases are higher than the costs of denying recovery in the cases considered in *Harlow*. The plurality therefore erred in applying this Court's implicit assessment of the costs of error in *Harlow* to the completely different situation presented in this case.

B. The Clear-and-Convincing Evidence Standard Is Not Needed to Screen Out Frivolous Unconstitutional Motive Claims.

In addition to assuming incorrectly that the costs of error in unconstitutional motive cases are equivalent to the costs in *Harlow*-type cases, the plurality also claims that a clear-and-convincing evidence standard is needed to screen out frivolous claims of unconstitutional motive. *See Crawford-El*, 93 F.3d at 821. Yet this Court recently noted that district courts are well-equipped to deal with frivolous claims, even where discovery is permitted. *See Clinton v. Jones*, 117 S. Ct. 1636, 1651 (1997) (noting that "most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant"). And this Court has noted in the context of qualified immunity that "firm application of the Federal Rules of Civil Procedure will ensure that federal officers are not harassed by frivolous lawsuits." *Butz v. Economou*, 438 U.S. at 508. It should come as no surprise then that the plurality fails to show why the draconian remedy of

requiring proof by clear-and-convincing evidence is necessary to screen out unfounded claims of unconstitutional motive.

The plurality supposes that "unconstitutional motive is . . . easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821. While this may be true, it does not follow that it is easy to survive a summary judgment motion brought prior to discovery. Plaintiffs cannot defeat a motion for summary judgment by pointing to the allegations in their pleadings. *See* Fed. R. Civ. P. 56(e) (A party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleadings."). The party must instead "set forth specific facts" in affidavits or other evidence establishing the alleged motive. *Id.* Most, if not all, plaintiffs with unfounded claims of unconstitutional motive will not be able to surmount this barrier, especially when the motion for summary judgment is brought prior to discovery.[6]

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[6] This is not, however, to say that discovery should never be permitted in unconstitutional motive case prior to summary judgment. The plurality's suggestion to this effect was rejected by a majority of the court below. *See Crawford-El*, 93 F.3d at 839-41 (Ginsburg, J., concurring in part); *id.* at 849 & n.6 (Edwards, C.J., concurring in remand). It is also inconsistent with the decisions of this Court, which have acknowledged that discovery may be necessary under certain circumstances before a qualified immunity claim can be resolved. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *see also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Penn. L. Rev. 23, 68 (1989) ("[C]ases decided post-*Anderson* recognize the need to resolve certain factual issues in immunity cases."). Not surprisingly, most courts of appeals have permitted limited discovery on issues directly relating to qualified immunity prior to ruling on motions for summary judgment. *See e.g., DiMeglio v. Haines*, 45 F.3d 790, 795 (4th Cir. 1995); *Lovelace v. Delo*, 47 F.3d 286, 287 (8th Cir. 1995); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670, 674 (7th Cir. 1990); *Maxey By Maxey v. Fulton*, 890 F.2d 279, 282 (10th Cir. 1989); *Unwin v. Campbell*, 863 F.2d 124, 132 n.5 (1st Cir. 1988).

See Grant v. Pittsburgh, 98 F.3d 116, 126 (3d Cir. 1996) (noting that summary judgment alone "adequately protects public officials . . . from groundless allegations of 'bad' intent").

Realizing that wholly-unsupported claims would be screened out by summary judgment under any evidentiary standard, the plurality claims that plaintiffs (presumably without meritorious claims) will "often be able to depict a selective pattern of decisions that . . . look fishy enough that a jury could reasonably find illicit motive by a preponderance." *Crawford-El*, 93 F.3d at 821. The plurality does not, however, explain how plaintiffs are likely to obtain evidence of prior decisions, much less concoct a pattern from those decisions, without the benefit of discovery. Further, a plaintiff alleging unconstitutional motive must do more than make an official's motive "look fishy" in order to survive summary judgment; the plaintiff must show a particular, unconstitutional motive, such as an intent to discriminate on the basis of race or an intent to retaliate for a particular statement or action. Few plaintiffs will be able to plausibly assert that, like petitioner, he made public statements critical of the official in question or, like *amicus*, that he was a critic of the agency that improperly investigated him. As a consequence, there is no reason to assume that plaintiffs without meritorious claims will be able to cobble together circumstantial evidence sufficient to prove a motive that is not only "fishy" but unconstitutional as well.

Furthermore, where the actions taken by a public official are objectively reasonable, courts may presume that the official acted in good faith. *Cf. Gehl Group v. Koby*, 63 F.3d 1528, 1535 (10th Cir. 1995) (once defendant shows objective reasonableness, burden shifts to plaintiff to establish subjective motivating animus). Such a presumption would in effect dictate that the objective reasonableness of an official's act is cogent evidence of good faith, requiring the plaintiff to produce similarly cogent evidence in response in order to defeat summary judgment. *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence: Doctrine & Practice* § 3.7, at 199 (1995). As a consequence, even if a plaintiff were somehow able to gather evidence showing a selective pattern of decisions that suggested

an unconstitutional motive, public officials who have acted reasonably would be subject to little risk of discovery and trial.

The plurality's suggestion that unconstitutional motive claims must be subjected to clear-and-convincing evidence in order to screen out frivolous claims finds no support in the decision of other circuits. The Third Circuit recently held that "a heightened summary judgment standard is not only unnecessary, but also undesirable in light of . . . *Anderson v. Liberty Lobby Inc.*, [477 U.S. 242 (1986)]." *Grant v. Pittsburgh*, 98 F.3d at 125-6; *see also Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994). Other circuits impose the limited requirement, either at the pleading stage or at summary judgment, of proffering "specific facts," "particularized evidence" or specific, nonconclusory allegations of unconstitutional motive. *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995); *Gooden v. Howard County*, 954 F.2d 960, 970 (4th Cir. 1991); *accord Veny v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995); *Shultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc); *Hill v. Shelander*, 992 F.2d 714, 717 (7th Cir. 1993).[7] And the Tenth Circuit places the burden on the *official* claiming immunity to "make a prima facie showing of the 'objective reasonableness' of the challenged conduct" before a citizen-plaintiff is required to offer the evidence supporting his or her claim of unconstitutional motive. *Gehl Group v. Koby*, 63 F.3d at 1535 (citation and quotation omitted). As Chief Judge Edwards commented, "if a 'clear-and-convincing' evidence standard were truly necessary," surely one of the other circuits to consider unconstitutional motive cases would have recognized it. *Crawford*, 93 F.3d at 851 (Edwards, C.J., concurring in remand).

[7] In an early and influential opinion on this subject, Judge Easterbrook described these standards as requiring plaintiff to have the "kernel of a case in hand." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992).

II. CONGRESS DID NOT INTEND TO EXTEND NEW IMMUNITIES TO PUBLIC OFFICIALS ACCUSED OF ACTING WITH AN UNCONSTITUTIONAL MOTIVE.

In addition to mistaking the public's interest in unconstitutional motive cases and the need for a clear-and-convincing evidence standard, the plurality also makes a more fundamental error: it misconstrues the role of the courts in shaping official immunity doctrine. The doctrine of official immunity is "essentially a matter of statutory construction." *Butz v. Economou*, 438 U.S. at 497; *see Scheuer v. Rhodes*, 416 U.S. at 243; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). As a consequence, the role of the courts is "to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice." *Malley v. Briggs*, 475 U.S. at 342; *see also Tower v. Glover*, 467 U.S. 914, 922-23 (1984) (Courts "do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound policy."). This is critical here because, whatever the relative costs and benefits of unconstitutional motive suits may be, there is no reason to think that in passing § 1983 Congress intended to afford public officials a special immunity against claims of unconstitutional motive.

The plurality does not point to, and *amicus* has been unable to find, any common law antecedent for the plurality's clear-and-convincing evidence standard. It is true that the precise contours of official immunity are not "slavishly derived" from the common law. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Nevertheless, courts are "guided in interpreting Congress' intent by common-law tradition." *Malley v. Briggs*, 475 U.S. at 342; *see Tower v. Glover*, 467 U.S. at 920 ("Section 1983 immunities are predicated upon a considered inquiry in the immunity historically accorded the relevant official at common law and the interests behind it.") (quotation omitted). Thus, while this Court may have reformulated the good faith immunity enjoyed by officials at common law into an objective standard in *Harlow*, the fact that there is no common law antecedent for any special immunity for unconstitutional motive torts strongly weighs against finding any congressional intent to recognize such an immunity.

See, e.g., Buckley v. Fitzsimmons, 509 U.S. 259, 280 (1993) (Scalia, J., concurring) (noting that the "presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language [of § 1983]") (quotation omitted).

More fundamentally, any immunity that would significantly impede plaintiffs with meritorious claims of discrimination and official abuse of power cannot be reconciled with Congress' purpose in enacting § 1983. Section 1983 was enacted as part of the Civil Rights Act of 1871 to "enforce the Provisions of the Fourteenth Amendment." ch. 22, 17 Stat. 13; *see Monroe v. Pape*, 365 U.S. at 172. As the "pervading purpose" of the Fourteenth Amendment was to "protect[ ] the newly-made freedman and citizen from the oppression of those who formerly exercised dominion over him," *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873), preventing official discrimination is clearly one of the primary purposes of § 1983.[8] It could not have been Congress' intent to introduce such an immunity *sub silentio*. Expanding immunity for public officials who discriminate is inconsistent with, and inimical to, the very purposes of the statute.

Nor is there any basis for suggesting that Congress intended to introduce a more general protection against claims of unconstitutional motive. The general purpose of § 1983 is to provide a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. at 172; *see also Owen v. City of*

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[8] Indeed, for the first fifty years after its passage, § 1983 was primarily employed to redress discrimination against African Americans. *See, e.g., Lane v. Wilson*, 307 U.S. 268, 269, 276-77 (1939) (affirming judgment against officials who denied African Americans the right to vote); *Nixon v. Condon*, 286 U.S. 73 (1932) (reinstating discrimination claim against election officials); *see generally* Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277, 282-87 (1965).

Independence, 445 U.S. 622, 650 (1980) ("The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power.") (quotation omitted). As shown above, constitutional violations involving unconstitutional motive, which include discrimination and retaliation for the exercise of constitutional rights, are among the most flagrant abuses of official power. Plainly, the Congress that enacted the Civil Rights Act of 1871 did not intend to introduce any new immunity for government officials accused of such abuses. Thus, whatever the views of the plurality as to the wisdom of unconstitutional motive suits against public officials, the Congress manifestly did not intend to require plaintiffs bringing suits under § 1983 to prove unconstitutional motive by clear and convincing evidence.

CONCLUSION

For the reasons stated above, this Court should reject the clear-and-convincing evidence standard proposed by the plurality below.

Respectfully submitted,

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(8)

No. 96-827

IN THE
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OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights and civil liberties of all Americans. Toward that goal, the ACLU has frequently represented individuals in *Bivens* and § 1983 actions seeking damages against government officials who have violated their rights. The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials for violations of constitutional rights.

Indeed, both the ACLU and its affiliates have been involved in some of the leading cases setting the legal standards for such actions, both as direct counsel and as *amicus curiae*, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

STATEMENT OF THE CASE

Petitioner is a District of Columbia prisoner who sued the respondent D.C. prison guard for damages, alleging -- with circumstantial evidentiary support -- that the guard violated his First Amendment rights by causing several boxes of his belongings, including active legal papers, to be misdelivered in retaliation for his statements to the press, his filings of grievances and lawsuits, and his assistance to other prisoners in filing grievances.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Sup. Ct. R. 37.3(a).

The district court dismissed the complaint because it did not meet the D.C. Circuit's now-abandoned requirement that a plaintiff must plead "specific direct evidence of [the defendant's unlawful] intent." Pet. App. Sec. 128a. The court of appeals, rehearing the case *en banc*, abandoned the "direct evidence" requirement, vacated the dismissal, and remanded the case for further proceedings.

Although its decision was fractured, a majority of the lower court ruled that a plaintiff in an unconstitutional motive constitutional tort case must establish the defendant's unconstitutional motive by clear and convincing evidence both at summary judgment and at trial. It is arguable that a majority of the court also ruled that in order to postpone decision on a defendant's pre-discovery motion for summary judgment under Fed. R. Civ. P. 56(f), a plaintiff in such a case must show more concretely than plaintiffs in all other cases that discovery is likely to lead to evidence that will prove the plaintiff's case by clear and convincing evidence.

SUMMARY OF ARGUMENT

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and subsequent cases, the Court struck a careful balance between the rights of individuals to vindicate their constitutional rights in *Bivens* and § 1983 cases, and the rights of government officials to be protected from meritless lawsuits. Government officials enjoy a qualified immunity in these cases, but individuals who overcome this immunity may pursue their claims consistent with the normal pleading, discovery, and summary judgment standards set forth in the Federal Rules of Civil Procedure.

The decision below upsets this carefully wrought balance. A majority of the judges properly concluded that the district court should determine on remand whether the plaintiff could

make a sufficient showing under Rule 56(f) of the Federal Rules of Civil Procedure to obtain discovery before responding on the merits to the defendants' motion for summary judgment. However, several of the opinions also suggest that special, more restrictive summary judgment and discovery rules should apply in civil rights cases involving unconstitutional motive, *see Crawford-El v. Britton*, 93 F.3d 813, 819 (D.C. Cir. 1996) (Williams, J.), 833-34 (Silberman, J., concurring), 841 (Ginsburg, J., concurring). That approach is irreconcilable with the Federal Rules and with the policies underlying *Bivens* and §1983 cases.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166-67 (1993), this Court made clear that the federal courts have no authority to alter the Federal Rules of Civil Procedure for particular categories of cases, whether at the pleading stage (as in *Leatherman*) or at the discovery and summary judgment stage (as here). Like plaintiffs in all other civil suits, *Bivens* and §1983 plaintiffs who have made "specific, nonconclusory factual allegations" in a Rule 56(f) affidavit are entitled to a reasonable opportunity to conduct discovery. *See Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment).

Additionally, a majority below held that even plaintiffs who can prove by a preponderance of the evidence that defendants violated their clearly established constitutional right to be free from unconstitutionally motivated governmental action should be denied a damages remedy. The unprecedented "clear and convincing evidence" standard that the majority fashioned would preclude recovery in substantial cases, contrary to the purpose of the qualified immunity doctrine, which is to protect government employees only from insubstantial cases, *see Harlow*, 457 U.S. at 819 n.35, and contrary to the constitutional design that

values individual rights at least as much as the convenience of government employees.

Part I of this brief demonstrates that the current qualified immunity rules, combined with a fair application of the Federal Rules of Civil Procedure, provide sufficient protection to shield government officials from meritless cases. The balance should not be shifted in defendants' favor without a solid demonstration -- absent in this record -- that frivolous cases are resulting in significant discovery and unnecessary trials and that an expanded immunity defense is both necessary and tailored to prevent such abuse. Part II shows that extraordinary restrictions on the ability of *Bivens* and § 1983 plaintiffs to obtain discovery and resist summary judgment do not meet this standard because they would violate the Court's precedents rejecting *ad hoc* amendments to the Federal Rules, and they would create unjustified obstacles to vindication of clearly established constitutional rights. Part III establishes that the "clear and convincing evidence" standard would transgress basic constitutional values and settled legal standards.[2]

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[2] This brief does not address the second Question Presented, which asks whether a government official should be immune "if she *asserts* a legitimate justification" for her action, even if the evidence clearly shows the real reason was an unconstitutional one. Pet. at i (emphasis added). In the court of appeals, only Judge Silberman advanced this rule, and neither the District of Columbia nor the United States as *amicus* supported it. Such a rule would be inconsistent with *Waters v. Churchill*, 511 U.S. 661, 684 (1994) (Souter, J., concurring) ("A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression."), and it would also be inconsistent with the prevailing view in other circuits, *see, e.g., Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). Moreover, such a rule would essentially cloak government officials with absolute -- rather than qualified -- immunity in cases where liability turns on motive. By definition,

(continued...)

ARGUMENT

I. A STRONG JUSTIFICATION IS REQUIRED FOR ANY ADDITIONAL RESTRICTIVE CONDITIONS ON THE ABILITY TO RECOVER DAMAGES FOR VIOLATIONS OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS

The qualified immunity available to government officials, coupled with a fair application of the Federal Rules of Civil Procedure, protects government officials from meritless *Bivens* and § 1983 lawsuits, while permitting victims of governmental overreaching to vindicate their individual constitutional rights. *See Harlow, 457 U.S.* at 819 n.35. The goal of qualified immunity is not to insulate officials from all liability, but only to protect them from the burdens of *insubstantial* lawsuits: "'insubstantial' suits against high public officials should not be allowed to proceed to trial." *Id.* (internal citations omitted). The qualified immunity created by *Harlow* prevents plaintiffs from proceeding without alleging violations of clearly established constitutional rights, and the Federal Rules of Civil Procedure enable defendants to block discovery or trial by plaintiffs who have concocted claims without any adequate factual basis. These protections save government officials from the burden of litigating meritless claims and allow them to exercise the discretion necessary to do their jobs.

Any claim that these protections should be significantly expanded requires, at the very least, a showing that the existing

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[2](...continued)
the "objective" facts in such cases also are consistent with a lawful motive or intent, and the official (with the help of her government lawyers) could articulate, *post hac*, a constitutional reason for her action.

rules are not adequate to protect government employees from meritless lawsuits. No such showing has been made. The interests of individuals in obtaining effective relief for violations of clearly established constitutional rights are no less worthy of protection than the interests of government officials. Plaintiffs in *Bivens* and § 1983 lawsuits already face substantial, unique burdens in prosecuting their claims. Any rule that makes it more difficult for plaintiffs to prevail will have the effect of precluding recovery in meritorious cases. *See Crawford-El* at 839 (Ginsburg, J., concurring). As a result, there is no basis for even considering an expansion of the qualified immunity defense without a solid demonstration that frivolous cases are resulting in significant discovery and unnecessary trials, and that an expanded defense is reasonably tailored to prevent such abuse.

A. An effective damages remedy is essential for violations of clearly established constitutional rights by government officials, including those who act from unconstitutional motives.

Effective protection of constitutional rights and individual liberties is at the core of the American constitutional system. That is why Congress created a damages remedy under 42 U.S.C. § 1983 for individuals whose federal constitutional or statutory rights are violated under color of state law, and why this Court recognized the right to a damages remedy when federal officials violate the constitutional rights of individuals. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. In many of these cases, "it is damages or nothing." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971). The need for an effective remedy is particularly urgent because a government "agent acting -- albeit unconstitutionally -- in the name of the

United States possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own." *Bivens*, 403 U.S. at 392. Without a meaningful remedy, these constitutional rights would be rendered meaningless.

Not only does a damages remedy provide relief to victims of constitutional violations, but it also holds government employees and employers accountable and deters unconstitutional behavior. Because governments often indemnify employees in these cases (*see* page 11, *infra*), the damages remedy gives federal, state and local governments themselves incentives to establish policies and practices to ensure that employees comply with clearly established constitutional principles, especially where no waiver of sovereign immunity has occurred. Removing the restraining effect of *Bivens* and § 1983 suits would risk substantial "unconstitutional mischief." *Crawford-El*, 93 F.3d at 840 (Ginsburg, J., concurring). To vindicate rights and discourage violations, therefore, it is essential to preserve an effective constitutional damages remedy against government officials who violate clearly established constitutional rights.

The availability of a remedy is no less important when the constitutional claim turns on the motives of governmental defendants than on their conduct. In a wide variety of circumstances, clearly established constitutional principles prohibit governments from taking adverse action against individuals for unconstitutional reasons. Denying the only meaningful remedy of damages in these cases would give government officials what amounts to a license to violate these clearly established constitutional rights.

One group of individuals who would be severely impacted by unwarranted curtailment of unconstitutional motive cases

consists of actual and prospective government employees. Government employees are protected from demotion, firing or other retaliation because of race, gender, age, religion, political affiliation or expression, or other improper reasons, and applicants for government employment are also protected from such discrimination. *E.g., Washington v. Davis*, 426 U.S. 229 (1976) (race); *Davis v. Passman*, 442 U.S. 228, 231 (1979) (gender); *Branti v. Finkel*, 445 U.S. 507 (1980) (political affiliation); and *Rankin v. McPherson*, 483 U.S. 378 (1987) (protected speech). Likewise, government contractors are protected from government officials acting for unconstitutional reasons. *E.g., Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996) (civil remedy available to independent contractors terminated for constitutionally protected speech). These clearly established constitutional rights would be nullified if government employees and contractors could not effectively pursue motive-based suits to discovery and trial.

Other categories of individuals have an equal need for damages remedies to vindicate their clearly established constitutional rights to be free from unconstitutionally motivated government action. Beneficiaries and potential beneficiaries of a broad range of governmental programs are protected from unconstitutionally motivated governmental action. *E.g., Romer v. Evans*, 116 S. Ct. 1620 (1996) (denial of government protection from discrimination); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (denial of zoning changes); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975) (denial of Social Security benefits); *Department of Agric. v. Moreno*, 413 U.S. 528 (1973) (denial of food stamps); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (denial of welfare payments); and *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of tax exemptions). Moreover, the Constitution bars government officials from interfering with voting and speech

rights because of political or religious views or because of sex, race, or other status. *E.g., City of Mobile v. Bolden*, 446 U.S. 55 (1980). Those under the care and supervision of the government, such as patients in public institutions and prisoners, also receive constitutional protection. For instance, the Constitution protects them from retaliation for the exercise of their First Amendment rights, and patients and prisoners subjected to inhumane institutional conditions or denied medical treatment deserve compensation if they can prove "deliberate indifference" on the part of an institution's employees. *E.g., Wilson v. Seiter*, 501 U.S. 294 (1991) (inhumane prison conditions); *Estelle v. Gamble*, 429 U.S. 97 (1976) (denial of medical treatment). In addition, it is well-settled that the government may not make prosecutorial decisions for unconstitutional reasons, such as the desire to suppress protected speech. *E.g., Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution).

Because the rights protected are so fundamental, demands for additional restrictions on cases alleging unconstitutionally motivated violations of clearly established constitutional rights should be carefully and skeptically scrutinized.

B. Government officials facing constitutional tort claims do not need additional protection because they can rely on the reasonable and significant safeguards already in place.

Plaintiffs alleging constitutional torts already face significant barriers to recovery designed to protect defendants from insubstantial claims, and these restrictive rules have achieved their intended purpose. Any further limitations would disrupt the balance established in *Harlow* and subsequent cases at the

expense of meritorious lawsuits alleging violations of clearly established constitutional rights.

Qualified immunity itself restricts the claims plaintiffs can bring. Under *Harlow*, plaintiffs suing government officials for civil damages must allege a violation of a clearly established constitutional or statutory right or face an immediate adverse judgment, either on a motion to dismiss or a motion for summary judgment. This standard protects defendants from having to go through discovery and trial even if the plaintiff's factual allegations are true and even if defendants in fact behaved unconstitutionally, so long as the constitutional guidelines were not clearly established at the time of defendant's action. *See Harlow*, 457 U.S. at 818 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."). Moreover, defendants asserting qualified immunity can bring an interlocutory appeal, notwithstanding the delay resulting from such an appeal. Defendants can immediately appeal unfavorable decisions on immunity (denials of motions to dismiss or for summary judgment), so long as they are based on a question of law rather than fact. *Johnson v. Jones*, 515 U.S. 304, 310 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)); *Behrens v. Pelletier*, 116 S. Ct. 834, 841 (1996) (rejecting rule that defendant claiming qualified immunity can bring only one interlocutory appeal on immunity issue).

Government employees can also force plaintiffs to adduce reasonably specific evidence of unconstitutional motive before plaintiffs may proceed to trial or even discovery. The procedural device usually employed by defendants in these cases is a pre-discovery motion for summary judgment. *See* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered*

Questions, 23 Ga. L. Rev. 597, 652 (1989). Faced with a summary judgment motion, plaintiffs have two options: Either they must produce specific, admissible evidence sufficient to carry their burden of proof at trial; or they must produce sufficient evidence to justify discovery. Plaintiffs who claim to need discovery to respond on the merits to summary judgment motions are not entitled to discovery as a matter of right or based on a general allegation that government officials operated with improper motives. Rather, they must demonstrate under Rule 56 that discovery is likely to provide information needed to support their claim. *See Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment). This standard effectively screens out insubstantial cases and spares defendants the burdens of discovery and trial. *See* page 21, *infra*.

Even after discovery, plaintiffs face a substantial burden to defeat summary judgment on the merits. Although the Court in *Harlow* was concerned about defendants' difficulties in obtaining summary judgment in unconstitutional motive cases, "subsequent clarifications to summary-judgment law have alleviated that problem." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). There is less, not more, reason today than when *Harlow* was decided to go beyond "firm application" of the Federal Rules to weed out meritless claims. *Harlow*, 457 U.S. at 808. Rule 56(c) requires plaintiffs to present evidence that creates a genuine dispute about a material fact and is sufficient to support a jury verdict in their favor on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A party loses at summary judgment if the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). These Rule 56 standards give government officials faced with insubstantial claims that they acted with

unconstitutional motives ample opportunity to obtain summary judgment and make it highly unlikely that meritless lawsuits will survive to interfere with their job-related duties.

Constitutional claims need not and should not be singled out for disparate treatment simply because the clearly established constitutional rights at issue involve not only what governmental employees did but why they did it. Motive or intent is a factual issue, and claims that turn on these facts should be subject to the same substantive and procedural standards as other kinds of claims. The qualified immunity standard need not change because a claim against a government official is based on motive. *Harlow* requires an objective inquiry only into whether the plaintiff has alleged a violation of a clearly established constitutional right. 457 U.S. at 818-19. This objective inquiry does not depend on the substantive merits of the case because qualified immunity is "distinct from the merits." *Behrens*, 116 S. Ct. at 839. "[A]lthough sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). As long as the constitutional right at issue is clearly established, it should be irrelevant, for immunity purposes, whether the factual dispute involves motive or some other contested issue.

That is true notwithstanding the claim that motive is "easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821 (Williams, J.). Indeed, that aphorism is entirely misplaced here because in *Bivens* and § 1983 cases, the burden is not on defendants to disprove the plaintiffs' allegations, but on the plaintiffs to prove them. More important, the assertion is simply incorrect. Unconstitutional motive cases are hard cases to bring and to win in the best of circumstances. The governmental

action that gives rise to the claim, by definition, is not inherently unconstitutional. Unless their defenses are insubstantial, defendants can identify objective, verifiable factors justifying their decision to act as they did. Plaintiffs virtually never have direct evidence of unconstitutional motive, *see Elliott*, 937 F.2d at 345, and plaintiffs typically must build a case relying on circumstantial evidence sufficient to create a genuine factual dispute and to negate defendants' evidence of legitimate reasons for the actions they took.[3]

Two recent decisions by the Court support the proposition that constitutional tort cases should not end with summary judgment and without discovery when genuine factual disputes exist, including those involving motive. In *Johnson v. Jones*, the Court held that qualified immunity decisions made at the summary judgment stage are immediately appealable, but only if they turn on the legal issue of whether a constitutional right is clearly established. 515 U.S. at 316. If the denial of immunity is based on a factual determination, then the relevant facts must be determined at trial, and only after trial could the defendant official appeal the determination about qualified immunity. The Court recognized that the resolution of a governmental defendant's "I didn't intend it" defense was a factual determination -- the same as the resolution of an "I didn't do it" defense. *Id.* ("Many constitutional tort cases . . . involve factual controversies about, for example, intent."). The Court understood that the lack of appealability means that denials of defendants' motions for summary judgment based upon genuine disputes

[3] If the defendant submits an affidavit in support of a summary judgment motion stating that she acted for constitutionally permissible reasons, the plaintiff must produce admissible evidence that her motives were illegal, and the plaintiff cannot rely on generalized attacks on the defendant's credibility or a claim that the affidavit is self-serving. *See Liberty Lobby*, 477 U.S. at 256-57.

about the material fact of the defendants' intent would go to trial. *See* 515 U.S. at 316 ("We recognize that . . . a district court's denial of summary judgment . . . forces public officials to trial"). But the interest in shielding defendants from discovery or trial in insubstantial cases does not justify extraordinary restrictions where plaintiffs have specific, genuine factual grounds for their claims, nor does it warrant exceptions to procedural and discovery requirements that the Federal Rules intend to apply in all kinds of cases.

Waters v. Churchill, 511 U.S. 661 (1994), represents a straightforward application of this approach. The Court reversed entry of summary judgment for a governmental employee in a § 1983 case and remanded it for a determination of whether the plaintiff had been fired because of her potentially protected statements or for some other reason. *Id.* at 681. The plaintiff had "produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation." *Id.* The ruling in *Waters* has not led to a deluge of frivolous § 1983 and *Bivens* cases.[4]

Waters also illustrates that the Court has narrowly tailored to particular problems any limitations on recovery in constitutional tort cases. Concerned that governments retain reasonable flexibility to manage their work forces, the Court held that governmental employees accused of taking adverse personnel action based on protected speech are not liable if they acted reasonably based on the information available to them, even if

[4] The Court in *Waters* did not apply a clear and convincing evidence standard to determine whether the plaintiff had produced enough evidence to survive summary judgment; thus, the D.C. Circuit's decision to heighten the burden of proof in unconstitutional motive cases, as discussed at page 19, *infra*, also is inconsistent with *Waters*. 511 U.S. at 681.

a jury could later conclude that the information was incorrect. *Waters*, 511 U.S. at 667. No sweeping change in evidentiary burdens or standards was necessary or appropriate to deal with this limited issue.

Finally, separate statutory protections for government officials sued because of actions undertaken in their official capacity significantly reduce any risk that constitutional cases will unduly interfere with governmental operations and employment policies. Restrictions on constitutional cases against governmental officials are intended to avoid any inordinate chill of their willingness to do their jobs and unwarranted problems in recruiting and retaining qualified, responsible employees. *See Harlow*, 457 U.S. at 814. In fact, civil rights suits usually do not threaten the personal financial resources of government employees. Under federal and state indemnification statutes, governments generally provide attorneys to employees involved in such suits, and indemnify many damage awards entered against employees. *E.g., Young v. Selsky*, 41 F.3d 47, 52 (2d Cir. 1994) (little personal risk to defendant in § 1983 suit because representation was provided by state attorney general, and employee would be indemnified by state for any damages unless resulting from intentional wrongdoing); *see generally Board of County Comm'rs v. Brown*, 117 S. Ct. 1382, 1404 (1997) (Breyer, J., dissenting) (collecting state statutes); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1174 n.408 (1996) (collecting federal statutes). Indemnification statutes alleviate the concern that civil rights suits deter people from entering public service because they enable government employees "to perform their functions free of the potential for financial loss suffered as a result of their job-related pursuits." 63C Am. Jur. 2d *Public Officers and Employees* § 407 (1997). Any limited residual

personal risk to governmental employees does not justify expanding the already substantial restrictions on individuals seeking remedies for violations of clearly established constitutional rights.

No showing has been made that the current qualified immunity rules unreasonably expose government officials to meritless claims. Proponents of expanding qualified immunity have not demonstrated that motive-based claims are more likely to be meritless or more likely to escape existing protections against frivolous lawsuits. The goal of qualified immunity, after all, is only to protect government officials from the burdens of *meritless* lawsuits. *Harlow*, 457 U.S. at 819 n.35. No evidence demonstrates that existing rules are inadequate to meet this goal. Nor does any evidence indicate that most or even many constitutional tort claims turn on the motives of government officials, or that motive-based claims are more likely to go to trial than others.[5] Without a demonstration that frivolous claims

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[5] To the extent that the concern is with lawsuits brought by prison inmates, as one of the opinions below seems to suggest, *see Crawford-El*, 93 F.3d at 830 (Silberman, J., concurring), there has been no showing that prisoners have filed any significant portion of the cases alleging unconstitutional motive. Prisoner civil rights cases often do not depend on the motives of prison guards or administrators. For instance, an inmate may sue for a procedural due process violation when facing disciplinary action without a hearing, or he may allege unjustified interference with his religious practices if not permitted to pray when he wishes. These cases do not turn on whether the motives of the government decision-maker were good or bad, and any alleged difficulties in weeding out insubstantial cases alleging unconstitutional motive (difficulties that are, at a minimum, easy to overstate -- *see* page 14, *supra*) do not apply. Furthermore, the percentage of prisoner civil rights cases that go to trial is no higher than the percentage of all civil cases that go to trial in federal district courts. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1996 Report of the Director*, Table C-4, at 159-60 (1997). Although the number of prisoner civil rights

(continued...)

based on unconstitutional motive are clogging the courts and preventing government officials from doing their jobs, their immunity need not and should not be expanded.

II. FAIR APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE AMPLY PROTECTS GOVERNMENT OFFICIALS FROM UNJUSTIFIED DISCOVERY

The Federal Rules of Civil Procedure give district judges ample discretion to limit the scope of discovery and to prevent unjustified or unduly burdensome discovery. To the extent any of the opinions below suggest that special and even more restrictive discovery rules should apply in *Bivens* and §1983 cases involving unconstitutional motive, *see Crawford-El*, 93 F.3d at 819 (Williams, J.), 833-34 (Silberman, J., concurring), 841 (Ginsburg, J., concurring),[6] that suggestion should be rejected as inconsistent with the Federal Rules and with the

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[5](...continued)
cases has increased by approximately one-third in the last five years, *id.* at 139, the number of prisoners has grown by the same rate in that period. Christopher J. Mumola & Allen J. Beck, *Bureau of Justice Statistics Bulletin*, "Prisoners in 1996" (June 1997).

[6] Judge Williams recommended that a plaintiff lose at summary judgment "unless, *prior to discovery*, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive." *Crawford-El*, 93 F.3d at 819 (emphasis added). Judge Silberman advocated his own rule that defendants prevail at summary judgment if able to assert any objectively reasonable basis for their actions, but he also suggested that among the other opinions, he most supported Judge Williams' approach to the discovery issue. *Id.* at 833. It is somewhat unclear whether Judge Ginsburg supported a heightened discovery standard, although the Solicitor General believes he does, as discussed at page 23 n.9, *infra*.

policies underlying *Bivens* and §1983 cases. There is no adequate justification for adopting any standard other than the existing Federal Rules of Civil Procedure applicable to discovery. Plaintiffs in *Bivens* and §1983 cases should not face a unique and unfair obligation to be, in effect, ready for trial even before they file lawsuit.

The standard applicable to discovery in *Bivens* and §1983 cases can have an enormous practical impact. As then-Judge Ginsburg explained, "[a]llowing plaintiffs to raise certain claims of unconstitutional motive could become an empty gesture were we to impose a blanket restriction on *all* discovery prior to the resolution of the qualified immunity issue on summary judgment." *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1437 (D.C. Cir. 1987). Because the best evidence concerning the motivation of governmental officials is often within the control of the government, plaintiffs in cases such as these need a reasonable opportunity for discovery in order to have a fair chance to carry their burden of proof. Severe limits on the ability of plaintiffs to obtain evidence that the purported justification for governmental action is pretextual would, as a practical matter, all but preclude recovery, despite the clearly established nature of the constitutional rights at stake and the lack of any alternative remedy for victims of government wrongdoing.

A. The Federal Rules cannot be modified on an *ad hoc* basis.

As an initial matter, the federal courts have no authority (outside the process created by the Rules Enabling Act, 28 U.S.C. §§ 2071-77) to alter the Federal Rules of Civil Procedure for particular categories of cases. This Court has held that the Federal Rules mean what they say, and judicial alteration of

those rules is unwarranted. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166-67 (1993) (striking down heightened pleading standard for certain §1983 cases). If alteration of the Federal Rules is warranted, it must be accomplished by "amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts must rely on summary judgment and control of discovery to weed out unmeritorious claims." *Id.* at 167.

This principle is as dispositive in the context of discovery standards as in the context of the pleading standards at issue in *Leatherman*. The Federal Rules provide a comprehensive framework for regulating discovery and adjudicating summary judgment motions. Federal courts therefore may not devise special rules for *Bivens* and § 1983 cases that do not apply to other categories of cases.

B. The Federal Rules give district judges broad authority to limit or deny discovery in appropriate cases.

Even if the federal judiciary were empowered to amend the Federal Rules and impose a different discovery standard on plaintiffs in unconstitutional motive cases, there would be no need to do so. The federal rules already protect government officials from insubstantial unconstitutional motive claims.

Under Rule 56(f), a trial court has broad discretion to control discovery at the summary judgment stage. When a plaintiff is faced with a summary judgment motion filed before she has had the opportunity to take discovery, she can file an affidavit setting out the need for discovery. If the plaintiff can set forth "specific, nonconclusory factual allegations," the trial

court typically should allow the plaintiff to proceed with at least limited discovery before ruling on the summary judgment motion.[7] *Siegert, 500 U.S.* at 23 (Kennedy, J., concurring in the judgment); *see also id.* at 247(Marshall, J., dissenting); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (Rule 56(f) allows a summary judgment motion to be denied or continued "if the non-moving party has not had an opportunity to make full discovery"); *Liberty Lobby*, 477 U.S. at 250 n.5 (summary judgment should ordinarily be denied when the nonmoving party "has not had the opportunity to discover information that is essential to his opposition"); *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). To do otherwise would preclude any meaningful prosecution of even the most meritorious case -- a plaintiff would be destined to lose on summary judgment unless she already had sufficient evidence to bring the case to a jury before any discovery was even taken.

This does not, however, mean that plaintiffs are free to conduct intrusive discovery even when their claims are insubstantial. If a plaintiff cannot show "a reasonable likelihood that additional discovery will uncover evidence to buttress the claim," the trial court has broad discretion to limit discovery appropri-

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[7] Rule 56(f) does *not* require a plaintiff opposing a pre-discovery summary judgment motion to possess at the outset of the case evidence sufficient to support a favorable jury verdict. If she already possesses the facts "essential to her opposition," invocation of Rule 56(f) would be unnecessary, and she could defeat summary judgment outright under Rule 56(c). The requirement that a *Bivens* plaintiff produce specific, nonconclusory factual allegations in response to a pre-discovery summary judgment motion is less demanding than the requirement imposed by Rule 56(c) of admissible evidence sufficient to carry the burden of proof at trial. *Branch v. Tunnell*, 937 F.2d 1382, 1387-88 (9th Cir. 1991), *cert. denied*, 114 S.Ct. 2704 (1994). The showing that a plaintiff must make to get discovery is less than the showing necessary to defeat summary judgment and get to trial.

ately or deny discovery altogether. *Crawford-El*, 93 F.3d at 849 (Edwards, J., concurring in the judgment); *see also Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment); *id.* at 247 (Marshall, J., dissenting); *Celotex*, 477 U.S. at 326; *Liberty Lobby*, 477 U.S. at 250 n.5. Rule 56(f) requires a plaintiff to present in an affidavit a "plausible basis for a belief that discoverable materials exist" that would be likely to raise a genuine issue of material fact. *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1206 (1st Cir. 1994). The party resisting summary judgment must identify specific facts that she expects to obtain through discovery, explain how discovery is likely to lead to those facts, and show that those facts are likely to create a factual question properly resolved at trial. *See* 6 James W. Moore, *Moore's Federal Practice*, ¶ 56.24, at 56-811 (2d ed. 1996 & Supp. 1997).[8] If the plaintiff cannot provide some specific support for general factual allegations in her complaint, summary judgment is properly granted at that point, allowing the government official to avoid the burdens associated with full scale litigation. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.").

The existing Federal Rules thus amply protect government officials from insubstantial cases, whether a case is based on

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[8] Adjudication of summary judgment motions before discovery raises particular problems when knowledge of the relevant facts "is exclusively with or largely under the control of the moving party." With a sufficient Rule 56(f) showing, the party opposing summary judgment should generally be given the opportunity to obtain those facts through discovery. 6 Moore, *supra*, ¶ 56.24, at 56-809; 10A Charles A. Wright, et al., *Federal Practice and Procedure*, § 2741, at 545 (2d ed. 1983 & Supp. 1997); *Resolution Trust Corp.*, 22 F.3d at 1208; *Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield of Michigan, Inc.*, 740 F.2d 423, 427 (6th Cir. 1984).

unconstitutional motive or another claim. There is no need for the Court to alter the standard applicable to unconstitutional motive cases and adopt a "special discovery threshold." *On Pet. for Cert.*, Opp. Br. for United States at 9.[9] Trial judges have the tools available to protect government officials from unmeritorious claims and are in the best position to determine, on a case by case basis, how to utilize those tools. "[A]district judge, whose experience with the management of discovery is far more extensive than [that of appellate judges], whose familiarity with the case and with the litigants is more immediate, and whose tools for controlling the course of litigation are more subtle and precise, is eminently qualified for this task." *Crawford-El*, 93 F.3d at 841 (Ginsburg, J., concurring). There is no reason to doubt that federal judges will perform this task responsibly, balancing the competing interests of plaintiffs seeking redress for violations of clearly established constitutional rights, and government employees faced with unnecessary or excessive discovery burdens. Trial judges can, and do, routinely limit discovery using the authority they possess under not only Rule 56(f) but also Rule 26(b) and (c). For example, a judge could limit discovery to issues going to the heart of the immunity question, and could restrict the number of depositions and interrogatories.

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[9] Judge Williams clearly endorses a heightened discovery standard in his opinion below, and Judge Silberman accepts Judge Williams' formulation as the next best option after his own, which would essentially obviate the need for any discovery. *See* page 19 n.6, *supra*. According to the Solicitor General, Judge Ginsburg's opinion in *Crawford-El* also advocated a heightened discovery standard. Judge Ginsburg would require the plaintiff to demonstrate a "reasonable likelihood, based upon specific evidence within the plaintiff's command, that discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor." *Crawford-El*, 93 F.3d at 841 (Ginsburg, J., concurring). Although it is not clear how drastically this formulation differs from the Federal Rules, the Court should decline to follow it to the extent that it raises the discovery threshold for unconstitutional motive cases.

The Court recently affirmed emphatically that federal judges can and should make these decisions based on the facts of individual cases. In *Clinton v. Jones*, 117 S. Ct. 1636 (1997), the Court rejected the claim that a sitting President is entitled to a stay of a civil lawsuit pending during his tenure in office. The Court understood the discovery and other litigation-related burdens that may be placed on a President embroiled in litigation while he attempts to carry out his official duties, but nonetheless held that it was within the discretion of individual district courts to weigh the competing interests on a case-by-case basis. Just as the Court has "confidence in the ability of our federal judges" to limit intrusive discovery in cases involving the President of the United States, *id.* at 1652, so can it trust trial judges to firmly apply the discovery rules in cases involving lower level government employees, such as the prison guard here.

III. REQUIRING VICTIMS OF CONSTITUTIONAL TORTS TO MEET AN EXTRAORDINARY STANDARD OF PROOF IS UNJUSTIFIED, UNNECESSARY, AND UNPRECEDENTED

The court below fashioned a clear and convincing evidence standard for plaintiffs whose clearly established constitutional rights are violated by governmental officials acting with an improper motive, even though neither party nor the Solicitor General advocated this standard and no other court has adopted it. There is no basis to single out these plaintiffs for this extraordinary burden -- a burden that would apply both at the summary judgment stage and at trial where any interest of government officials in not being tried no longer applies.

A "clear and convincing" evidentiary standard would not further the purpose of the qualified immunity doctrine to nip in the bud "insubstantial" suits against government officials. *See*

Harlow, 457 U.S. at 819 n.35. By any measure, a case is substantial if the plaintiff can prove by a preponderance of the evidence that the defendant violated her clearly established right to be free from unconstitutionally motivated governmental action. The "clear and convincing" standard would prevent these plaintiffs from obtaining any redress. Individuals who produce specific, admissible evidence sufficient to demonstrate that their clearly established constitutional rights were more likely than not violated by government officials motivated by antagonism to their sex, age, race, religion, political allegiance, views, or other illegitimate factors should be allowed to proceed to trial and to recover damages.

A. A heightened evidentiary standard should be used to protect individual constitutional rights, not limit them.

A standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication," and also "serves as a societal judgment about how the risk of error should be distributed between the litigants." *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 282-83 (1990) (internal quotations and citations omitted). "In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (internal quotations and citations omitted). Imposing an unusually demanding standard of proof in constitutional tort cases would proclaim that, in our society, constitutional rights of individuals are less important than the convenience of government employees. But the vindication of individual rights should hold a favored, not disfavored, place in the federal courts.

That is why courts have raised the standard of proof in constitutional cases only to protect, not limit, the vindication of individual rights, and only when more than monetary damages are at stake. "Exceptions to [the preponderance] standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action -- action more dramatic than entering an award of money damages or other conventional relief -- against an individual." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989). The court below turned this principle on its head. *See Crawford-El*, 93 F.3d at 822 (Williams, J.). The cases it invoked to protect the government from claims by individuals in fact imposed a heightened evidentiary standard to protect individuals from claims by the government. These cases include *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) (clear and convincing evidence of grounds for deportation because of "drastic deprivations" resulting from erroneous decision); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (clear and convincing evidence in denaturalization proceedings because "rights once conferred should not be lightly revoked"); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (clear and convincing evidence standard in civil commitment proceedings because of possibility of "significant deprivation of liberty"); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (clear and convincing evidence before a state "may sever completely and irrevocably the rights of parents in their natural child"); and *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (clear and convincing evidence of actual malice in libel suits against public officials because of First Amendment protection of debate on public issues).[10] It would be unjustified, and unprecedented, to apply

[10] A clear and convincing evidence standard has been used in the civil context where quasi-criminal conduct is at issue, *see Crawford-El*, 93 F.3d at (continued...)

the clear and convincing evidence standard to benefit an alleged violator of the Constitution.

B. The same evidentiary standard should apply in unconstitutional motive cases against government officials as in analogous cases against government officials and the government itself.

Imposing an extraordinary evidentiary burden on individuals in cases involving violations of clearly established constitutional rights would be particularly anomalous because no such burden is imposed in civil cases asserting analogous statutory and tort claims against both governments and government officials. A "preponderance of the evidence" standard is the firmly settled norm in civil cases. *See Price Waterhouse*, 490 U.S. at 253; 9 *Wigmore on Evidence* § 2498. No general exception exists for cases against government officials motivated by illegal considerations. The "preponderance" standard applies in sex, age, and race discrimination cases whether the individual accusing of making employment decisions for the wrong reasons worked for a public or private employer. *E.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (Title VII racial discrimination); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (Title VII gender discrimination); *Scaria v. Rubin*, No. 1072, 96-6211, 1997 WL 353288 (2d Cir. June 13, 1997) (ADEA and Title VII gender discrimination); *Roberts v.*

[10](...continued)
822 (Williams, J.), but no equivalent reputational stigma attaches in § 1983 or *Bivens* cases involving damages claims against government employees. The justifications for a clear and convincing evidence standard in other contexts cited below (*id.*, citing 9 *Wigmore on Evidence* § 2498 (3d ed. 1940) with respect to lost wills and oral contracts to make bequests) also have no applications in § 1983 or *Bivens* damages cases.

National Health Corp., 963 F. Supp. 512, 516 (D.S.C. 1997) (ERISA benefits discrimination). A variety of statutes provide a remedy against federal and state governments, and a "preponderance" standard generally applies in those cases even though they expose government employees to discovery burdens and adverse personnel actions if liability is found. *E.g., Budden v. United States*, 15 F.3d 1444, 1449 (8th Cir. 1994) (Federal Tort Claims Act).

The anomaly of imposing a "clear and convincing" standard in constitutional cases but a "preponderance" standard in statutory and tort cases is heightened because plaintiffs often join statutory and common law tort claims with their constitutional tort claims. Crawford-El himself, for example, has a state law conversion claim. *See Crawford-El*, 93 F.3d at 816 n.1; *see also Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991) (plaintiff sued prison officials under *Bivens*, Federal Tort Claims Act and federal wiretap law), *rev'd*, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated and remanded*, 515 U.S. 321 (1995). Since government employees would still face discovery and other litigation-related burdens and risks resulting from the claims on which the plaintiff could proceed under a "preponderance" standard, it would make no sense to use a heightened evidentiary standard to prevent the plaintiff from proceeding on related *Bivens* and § 1983 claims.

Likewise, it would be incongruous for a plaintiff to bear a heavier evidentiary burden in a damages suit than an injunction suit. Plaintiffs do not have to overcome qualified immunity to gain injunctive relief against government officers. *See Crawford-El*, 93 F.3d at 831-32 (Silberman, J., concurring). Thus in suing for an injunction, plaintiffs need not present clear and convincing evidence in order to survive summary judgment and proceed to trial. In many cases, plaintiffs seek both

injunctive and monetary relief. Whether plaintiffs can assert a claim for monetary relief in addition to, or instead of, a claim for equitable relief is often merely a matter of chance -- depending on whether, for example, the defendant manager still supervises the plaintiff employee, or the defendant guard still oversees the plaintiff prisoner. The ability to proceed and prevail should not turn on such fortuity.

A "clear and convincing" standard in unconstitutional motive cases would not be effective in achieving its purported rationale. As explained above, it would preclude substantial claims, not just the insubstantial claims against which the qualified immunity defense is directed. Moreover, raising the evidentiary bar will often not reduce any litigation-related burdens borne by government employees, a primary concern for the qualified immunity established in *Harlow*, 457 U.S. at 814. The heightened evidentiary standard would apply only to claims against government employees for damages, and not to claims for injunctive relief against employees or to claims for damages from the government itself. *See* page 29, *supra*. The usual "preponderance" standard would apply to these other claims. In many cases, therefore, plaintiffs could proceed with discovery against, and call as trial witnesses, allegedly responsible government employees, even though they were not technically defendants in the case. The effect of the heightened burden would be not to alleviate the burden of litigation on government employees, but only to reduce opportunities to vindicate constitutional rights and to deter unconstitutional behavior.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals, vacating the dismissal of petitioner's complaint and remanding the case for further proceedings, should be affirmed.

However, the ruling of the court of appeals that a plaintiff in an unconstitutional motive constitutional tort case must establish the defendant's unconstitutional motive by clear and convincing evidence both at summary judgment and at trial should be disapproved, and the Court should make it clear that the Federal Rules of Civil Procedure apply to govern discovery in such cases, just as they do in all others.

Respectfully submitted,

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August 14, 1997

(9)

No. 96-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF J. MICHAEL QUINLAN AND LOYE W. MILLER, JR. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* *

Amici curiae J. Michael Quinlan and Loye W. Miller, Jr. are former federal officials who are also defendants in a long-running and much publicized *Bivens* [1] action with which this Court is familiar.[2] Quinlan is the former Direc-

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* No counsel for any party had any role in authoring this brief, and no person other than the named amici and their counsel made any monetary contribution to its preparation and submission.

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Counsel for both petitioner and respondent have consented to the filing of this Brief, and amici have filed with the Clerk of Court, pursuant to Sup. Ct. R. 37.3(a), letters stating such consent.

tor of the Federal Bureau of Prisons ("BOP") and Miller is the former Director of Public Affairs for the United States Department of Justice. Both are *Bivens* defendants alleged to have acted with an improper motive in violation of the First Amendment rights of a federal inmate. *See Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *rehearing and rehearing in banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated on other grounds*, 515 U.S. 321 (1995).

The principal issue in *Kimberlin*, as in this case, is whether a "heightened pleading standard" applies when a plaintiff sues a public official in a *Bivens* or 42 U.S.C. § 1983 action and alleges unconstitutional motive.[3] Nearly all of the appellate litigation in *Kimberlin* focused on whether a heightened pleading standard should apply in *Bivens* cases that turn on motive and, if so, what that standard should be. Quinlan and Miller have a strong interest in the issue before this Court as their case is presently pending in the United States District Court for the District of Columbia, awaiting a decision on their motion for summary judgment asserting qualified immunity. The manner by which this Court resolves the issues before it in this case will likely have a direct bearing on the outcome of the ongoing *Kimberlin* litigation. Indeed, amici Quinlan and Miller participated as amici in this case in the Court of Appeals and proposed the "clear and convincing evidence" test adopted by the majority of that court. *See Crawford-El v. Britton*, 93 F.3d 813, 852 n.9 (D.C. Cir. 1996) (en banc) (Edwards, CJ., dissent).

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[3] The dispute here is brought pursuant to 42 U.S.C. § 1983 rather than *Bivens*. The applicable principles of immunity law, and thus of any applicable heightened pleading standard, apply equally to both types of suits seeking damages from individual officials. *See Butz v. Economou*, 438 U.S. 478, 504 (1978) ("we deem it untenable to draw a distinction for purposes of immunity law between" section 1983 actions and *Bivens* actions).

STATEMENT

Petitioner Leonard Rollon Crawford-El, is a District of Columbia inmate serving a life sentence for murder. He alleges in his Fourth Amended Complaint, *inter alia*, that respondent Patricia Britton, a District of Columbia corrections officer, took certain actions with respect to petitioner in retaliation for the previous exercise by petitioner of his First Amendment rights. Essentially petitioner claims that respondent retaliated against him by having certain personal items sent to petitioner's brother-in-law rather than to petitioner himself when petitioner was transferred from one correctional facility to another. According to petitioner, respondent allegedly took this action in retaliation for petitioner having exercised his First Amendment rights by speaking with the press. Petitioner also alleges a denial by respondent of his First Amendment right of access to the courts. *Crawford-El v. Britton*, 93 F.3d at 815.

Following the district court's dismissal of petitioner's Fourth Amended Complaint, the Court of Appeals reviewed the case *en banc* on its own motion to determine the standard of pleading or proof necessary for plaintiff to withstand dismissal on qualified immunity grounds where the plaintiff alleges unconstitutional motive. The *en banc* court issued a decision with four separate majority opinions and one dissenting opinion. A majority of the court decided to jettison what had been the rule in the District of Columbia Circuit, that a plaintiff must produce "direct evidence" of improper motive to withstand an assertion of qualified immunity. In its place, the Court fashioned a test that requires a

> *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the unconstitutional motive (where that is an element of the tort) *by clear and convincing evidence*.

93 F.3d at 838 (Ginsburg, J., concurring) (emphasis supplied). *See also*, 93 F.2d at 821-24 (Williams, J.). This

standard applies "equivalently at summary judgment and trial, as a seamless web." *Id.* at 823. As Judge Ginsburg further explained:

> a plaintiff will feel the weight of this burden not only at trial but also in opposing a motion for summary judgment; in both contexts the plaintiff will have to present evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive.

Id. at 838-39.[4] Thus, in the District of Columbia Circuit, in order to survive a dispositive motion in a motive-based *Bivens* case in which qualified immunity is asserted as an affirmative defense, the *Bivens* plaintiff must present "clear and convincing" evidence of that motive.

The Court of Appeals has defined "clear and convincing" evidence in other contexts as "generally requir[ing] the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." *United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994). Likewise, the Court of Appeals has noted that *Black's Law Dictionary* defines "clear and convincing" proof as "proof which results in reasonable certainty of truth." *Id.*, citing *Black's Law Dictionary* 251 (6th ed. 1990). *See also Clifford S. Fishman, Jones on Evidence: Civil and Criminal* § 3:10 (7th ed. 1992) (clear and convincing evidence is "a firm belief or conviction" that the allegations at issue are true).

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[4] Six judges concurred in the "clear and convincing" evidence standard and five judges dissented. Judge Ginsburg's concurring opinion is the controlling opinion in *Crawford-El* even though Judge Williams wrote the primary opinion for the majority. Although separate concurring opinions were authored by Judges Silberman, Ginsburg and Henderson, Judge Ginsburg's opinion is the most restrictive of the majority opinions. Judges Buckley and Sentelle apparently joined in Judge Williams' opinion since his opinion is identified as the "opinion for the Court" and they did not join in the dissenting opinion authored by Chief Judge Edwards and joined by Judges Wald, Randolph, Rogers and Tatel.

SUMMARY OF ARGUMENT

This Court should hold that a heightened pleading standard applies in *Bivens* and section 1983 cases where the plaintiff alleges an unconstitutional motive on the part of the defendant. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court adopted a wholly objective test to assess a government official's entitlement to qualified immunity. The test seeks to accommodate a damages remedy under the constitution with minimizing the heavy social costs such litigation necessarily imposes on individually sued government officials. Application of *Harlow's* objective test is problematic, however, when unconstitutional motive is an element of a plaintiff's claim, because the question of motive is wholly subjective.

Generally the courts of appeals have addressed the problem by applying a "heightened pleading standard" to *Bivens* and section 1983 actions. Heightened pleading standards are impelled by: (i) the expansive language in *Harlow* and its progeny emphasizing objectivity; (ii) this Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." The substantive policy concerns undergirding immunity justify the direct evidence standard and give substance to the promise that qualified immunity is an "immunity from suit." A heightened pleading standard in this context is not precluded by the Court's precedents or by the Federal Rules of Civil Procedure. Rather, the substantive right of immunity overrides the application of any procedural rule.

The Court should adopt the "clear and convincing evidence" heightened pleading standard adopted by the District of Columbia Circuit in this case. It is a standard that is easily understood, has a substantial body of case law from other contexts and would best serve the competing interests in motive-based cases that *Harlow* sought to address and objectify in the qualified immunity setting.

ARGUMENT

I. A HEIGHTENED PLEADING STANDARD IS NECESSARY TO MAKE QUALIFIED IMMUNITY MEANINGFUL IN CASES WHERE UNCONSTITUTIONAL MOTIVE IS ALLEGED.

This Court should hold that a heightened pleading standard [5] applies in constitutional tort and section 1983 cases where, as here, a plaintiff alleges an improper or unconstitutional motive on the part of an individually sued public official. There is a critical and important need for such a requirement. Otherwise, as the Sixth Circuit has observed, "[t]he promise of early exit from a lawsuit offered by qualified immunity is an empty promise." *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995). Indeed, Justice Kennedy has observed, we believe correctly, that "the heightened pleading requirement is the most workable means to resolve" constitutional tort cases in which the plaintiff alleges improper motive and the defendant asserts an entitlement to qualified immunity. *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy J., concurring).

The recurring problem for the lower courts is based in the tension between the two countervailing interests this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), sought to reconcile: providing a damages remedy to vindicate constitutional guarantees and minimizing the heavy social costs imposed by litigation against public officials in their individual capacities. *Harlow*, 457 U.S. at 814 citing *Butz v. Economou*, 438 U.S. 478, 506 (1978) and *Bivens*, 403 U.S. at 410. Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting government's abil-

[5] The term "heightened pleading standard" has been criticized as a misnomer and that it should more properly be characterized as a "heightened production standard." *Crawford-El*, 93 F.3d at 823. Nonetheless, for ease of reference we refer throughout to the "heightened pleading standard."

ity to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

In *Harlow*, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). The Court abandoned the then-existing two-part test composed of objective and subjective factors in favor of a wholly objective approach. The Court explained that the subjective, good faith element of qualified immunity "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16; *Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996). Thus, after *Harlow*, government officials are entitled to qualified immunity so long as their conduct is "objectively reasonable" and does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This Court has reiterated the objective approach to qualified immunity in the years subsequent to *Harlow*. *See Davis v. Scherer*, 468 U.S. 183, 191 (1984) ("[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *No other 'circumstances' are relevant to the issue of qualified immunity.*") (emphasis added) (citation omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* "purged qualified immunity of its subjective components"); *Anderson v. Creighton*, 483 U.S. at 641 (examination of the reasonableness of a warrantless search "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize"). Nevertheless, in the fifteen years since *Harlow* was decided, the lower courts have grappled with how to apply *Harlow's* wholly objective approach to cases where the question of motive is critical to the alleged constitutional violation.

Although their formulations have differed, the courts of appeals have almost uniformly adopted some form of heightened pleading standard to address what Judge Easterbrook has termed the "conundrum" presented by the *Harlow* formulation in unconstitutional motive cases. *Elliott v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992). *See e.g. Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995) (court requires "particularized evidence" demonstrating "improper motive"); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc) (court requires plaintiff to "plead specific facts in a nonconclusory fashion"); *Veney v. Hogan*, 70 F.3d at 922 (court requires "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity."); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (court requires "nonconclusory allegations of subjective motivation").

Clearly, therefore, the need for a heightened pleading standard in motive-based cases is impelled by: (i) the expansive language in *Harlow* and its progeny emphasizing objectivity; (ii) the Supreme Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." Like other areas of the law where policy concerns limit the types of evidence that can be used or the inference that can be drawn from such evidence, the substantive policy concerns undergirding qualified immunity justify a heightened pleading standard. Heightened pleading standards are necessary to give substance to the promise that qualified immunity is an "immunity from suit" in cases where unconstitutional motive is alleged.

II. A HEIGHTENED PLEADING STANDARD IS NOT BARRED BY THE COURT'S DECISION IN *LEATHERMAN* OR BY THE FEDERAL RULES OF CIVIL PROCEDURE.

The need for a heightened pleading standard in cases where unconstitutional motive is alleged is not undermined by this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), or by the Federal Rules of Civil Procedure. In *Leatherman*, the Court held that there is no justification for a heightened pleading requirement for claims against municipalities brought pursuant to section 1983. The Court, however, expressly cordoned off and declined to rule on the question of whether requiring heightened pleading as to individuals in qualified immunity cases is permissible. 507 U.S. at 166-67. Emphasizing that *Leatherman* involved a *municipal* defendant not entitled to immunity, the Court stated, "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

Apart from the obvious, that *Leatherman* specifically refrained addressing the issue of heightened pleading in a qualified immunity context, the decision provides no basis for a conclusion that the Federal Rules of Civil Procedure foreclose heightened pleading standards in *Bivens* and § 1983 cases. Indeed, requiring heightened specificity in *Bivens* cases is consistent with both the emphasis in *Anderson v. Creighton* on the "particularized" manner in which the immunity inquiry is to be undertaken, 483 U.S. at 640, as well as with a "firm application" of Rule 8's mandate that a plaintiff demonstrate his or her entitlement to the relief sought. *Leatherman* did not alter those principles.

Moreover, qualified immunity is an affirmative defense, and thus, generally arises only when a defendant asserts it in a Rule 12 motion to dismiss, in a Rule 56 motion

for summary judgment or in an Answer. When such a motion or responsive pleading is filed, the defendant's *substantive right* to qualified immunity makes it incumbent upon the plaintiff, at a minimum, to respond with specific, concrete facts supporting the plaintiff's general averment of malice or improper motive. *See* Fed. R. Civ. P. 56(e) (requiring through affidavits and other evidence "specific facts showing there is no genuine issue for trial"). To conclude otherwise would abrogate the substantive immunity possessed by public officials that is intended to free them from the burdens of litigation.

Because qualified immunity is a substantive right, it trumps any federal procedural rule pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Thus, "[t]o the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity," *Schultea v. Wood*, 47 F.3d 1427, 1436 (5th Cir. 1995) (en banc) (Jones, J. concurring). Indeed, as Judge Jones explained in her concurring opinion in *Schultea*,

> Despite a superficial relevance, *Leatherman* cannot faithfully be read to preclude—or even indict—the application of a heightened pleading requirement in actions against individual government officials.

Id. at 1435.

That conclusion is consistent with Justice Kennedy's concurrence in *Siegert*, as well as with the opinions of several other courts of appeals decided subsequent to *Leatherman*. Justice Kennedy observed that "[t]he heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis." 500 U.S. at 235. He further noted that although heightened pleading "is a departure from the usual pleading requirements of" Rules 8 and 9(b) of the Federal Rules of Civil Procedure,

> avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Id.[6]

More recently, the courts of appeals that have considered whether a heightened pleading standard properly can be required in the wake of *Leatherman*, have adhered to the view that *Leatherman* did not alter the analysis for establishing a heightened pleading requirement in the first place. *See Branch v. Tunnell*, 14 F.3d 449, 455-57 (9th Cir.), *cert. denied*, 512 U.S. 1219 (1994); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995); *Veney v. Hogan*, 70 F.3d at 921-22; *Schultea v. Wood*, 47 F.3d at 1433; *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994). As the Sixth Circuit explained in *Veney*, a "failure to impose" a heightened pleading standard in these cases

> would eviscerate the substantive rights afforded by the qualified immunity defense. The promise of early exit from a lawsuit offered by qualified immunity is an empty promise if plaintiffs are routinely permitted to survive a motion to dismiss with mere "notice" pleading.

70 F.3d at 922.

Accordingly, there is no merit to a contention that *Leatherman* or the Federal Rules foreclose heightened pleading requirements in the qualified immunity arena. The Court not only may impose such a requirement, it manifestly *should* impose such a requirement to ensure

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[6] As Judge Jones also observed in *Schultea*, the three justices who dissented in *Siegert* (justices Marshall, Blackmun and Stevens) each "recognized the necessity for some form of heightened pleading in qualified immunity cases . . . Accordingly, four justices endorsed a heightened standard in qualified immunity and none disagreed." 47 F.3d at 1436.

that the important policies undergirding qualified immunity are, in fact, realized.

III. THE COURT SHOULD ADOPT THE DISTRICT OF COLUMBIA CIRCUIT'S "CLEAR AND CONVINCING EVIDENCE" HEIGHTENED PLEADING STANDARD.

Once the Court decides to impose a heightened pleading standard the task remains to determine what standard it should apply. The Court should adopt the "clear and convincing evidence" standard adopted by the District of Columbia Circuit in this case. As Judge Williams has noted, the array of options for resolving motive-based *Bivens* claims spans the spectrum "from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent." *Kimberlin v. Quinlan*, 17 F.3d at 1525 (Williams, J. concurring in the denial of rehearing *in banc*), *vacated, on other grounds*, 515 U.S. 321 (1995). The height at which the bar is set depends upon "the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money." *Id.* at 1525-26.

As articulated by the District of Columbia Circuit, the application of a clear and convincing evidence heightened pleading standard is easily understood, has a substantial body of case law from other contexts and will best serve the qualified immunity goals and analysis set forth in *Harlow*. Under this approach, a plaintiff alleging improper motive, upon receiving either a motion to dismiss or for summary judgment asserting qualified immunity, would be required to support the motive-based claims in his or her complaint with clear and convincing evidence that demonstrates unconstitutional motive. Application of this standard would permit a plaintiff to rely on all available evidence in support of his or her claim (whether

direct or circumstantial) without thereby subjecting the defendant official to the burdens of litigation any time that a plaintiff can assemble weak facts and circumstances that *might* persuade a jury by a preponderance of the evidence that the defendant acted with an unlawful motive.

The clear and convincing evidence standard, as applied in this context, would thus work much as it does in the defamation and many other settings. An evaluation of summary judgment in an immunity context would, as with a defamation claim, require a court to "view the evidence submitted through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986). Therefore, unless a plaintiff could respond to an official's claim to qualified immunity with evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence, the defendant official should be accorded immunity. *Id.*

The application of a "clear and convincing" standard is supported by the venerable principle that government officials are presumed to act in good faith absent proof to the contrary. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (the "presumption of regularity . . . supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties"). Thus, for example, when relief is sought directly from the government based upon an alleged bias or impermissible motive on the part of the government official, the lower courts have erected a high barrier to shield the government from unsubstantiated bias claims. Because there is a strong presumption that government officials act in good faith, the courts have held in those contexts that a plaintiff alleging bad faith must come forward with "well-nigh irrefragable proof to overcome the presumption of good faith." *Torncello v. United*

States, 681 F.2d 756, 770 (Ct. Cl. 1982); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993).

Moreover, clear and convincing evidence is a well-known standard with a well-developed body of caselaw. It is easily understood and has been employed by the courts in a variety of contexts where public policy justifies requiring a plaintiff to support his claims with strong evidence. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 282 (1990). For example, recognizing that fraud is simple to allege and is ordinarily a question for a jury, the courts commonly require clear and convincing evidence of fraud to support a tort action. *Woodby v. INS*, 385 U.S. 276, 285, n.18 (1966). Clear and convincing evidence of improper motive is also required in libel cases involving public figures, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), as well as to prove oral contracts, and in deportation, denaturalization and civil commitment proceedings. *Cruzan*, 497 U.S. at 282 (citing cases).

As explained in *Cruzan*, this Court has mandated clear and convincing evidence as a standard of proof where the interests at stake are important and involve more than a mere loss of money. 497 U.S. at 282. The purposes of qualified immunity and the particular dangers of permitting an inquiry into an official's motive,[7] constitute "particularly important" interests that justify the application of a clear and convincing standard where improper motive is alleged in the *Bivens* context.

The clear and convincing evidence standard is also most faithful of any of the tests adopted by the courts of appeals to the concerns undergirding the qualified immunity doctrine. Likewise, it is a test less susceptible

[7] *See United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (Frankfurter, J.) (recognizing that probing the mental processes of the Secretary of Agriculture would be "destructive" to the integrity of the administrative process).

both to abuse by plaintiffs and to errors by the district court. Thus, the Court should adopt clear and convincing evidence as the heightened pleading standard applicable to analyze entitlement to qualified immunity when unconstitutional motive is alleged. Any lesser protection will impose "on officials the very costs and burdens . . . that *Harlow* intended to spare them." *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(12)

No. 96-827

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LEONARD ROLLIN CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE STATES OF MISSOURI, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS

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QUESTIONS PRESENTED

I.

Whether, in an action under 42 U.S.C. § 1983, the imposition of a "clear and convincing" burden of proof is consistent with the protections afforded government officials by qualified immunity, and as enforced by a majority of the circuits through heightened procedural protections.

II.

Alternatively, whether the Court should address the issue left open in *Leatherman v. Tarrant County Narcotics Unit* and confirm that qualified immunity jurisprudence requires a heightened pleading standard in § 1983 cases involving individual government officials.

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BRIEF OF THE STATES OF MISSOURI,

Pursuant to Sup. Ct. R. 37, the thirty-three signatory States, and the Territories of Guam and the Virgin Islands respectfully submit this brief as *amici curiae* in support of respondent.

STATEMENT OF *AMICUS* INTEREST

This case presents an important question concerning government officials' right to qualified immunity and its effective enforcement by the courts in actions brought against those officials under 42 U.S.C. § 1983. This right is protected through an objective test, and the Circuit Court for the District of Columbia adjusted the burden of proof in order to ensure its effective application.

The practical application of the test in such cases, where government officials face personal liability, is of extraordinary importance to those officials. Without the employment of a means that effectively ensures their entitlement to qualified immunity is protected, and that they will not be unnecessarily subjected to the burdens of litigation, government officials will be distracted in the performance of their duties, and deterred from the lawful, vigorous exercise of their discretion. The public good will suffer in turn.

Nowhere are the dangers of interference with government officials' duties more acute than in cases of the type that Crawford-El brings, concerning an alleged retaliatory motive. Such a claim, easily made and difficult to disprove short of discovery and trial, aptly illustrates the need for the imposition of the pleading and proof burdens imposed on plaintiffs who choose to sue government officials. Lowering those burdens would dramatically dilute, if not eviscerate, the protection that qualified immunity currently affords those who have chosen to carry out critical government functions.

STATEMENT

Leonard Crawford-El is a prisoner in the District of Columbia correctional system, serving a life sentence for murder. He sued Patricia Britton, a D.C. correctional official, under 42 U.S.C. § 1983 for failing to follow his delivery instructions for some boxes of his personal property. The crux of his claim is that Britton did not deliver them directly to him; rather, she did so indirectly, through his brother-in-law. He alleges that this misdelivery was an act of retaliation for his prior contact with the media and thus violated his First Amendment rights.

The case has had a tortured procedural history below. Crawford-El filed suit in 1989. The district court denied Britton's initial motion for dismissal and summary judgment, in which she asserted her entitlement to qualified immunity, and Britton appealed. The Court of Appeals for the District of Columbia Circuit applied a heightened pleading standard to Crawford-El's allegations and remanded to permit the district court to decide whether to permit repleading. *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991).

Crawford-El was permitted to replead and did so, by filing his Fourth Amended Complaint. Two claims that had appeared in prior incarnations of the complaint, access to courts and due process, again suffered dismissal by the district court, and that decision was affirmed. *Crawford-El v. Britton*, No. 94-7203, Mem. Op. at 1-2 (D.C. Cir. Nov. 28, 1995).

Among the claims made in the Fourth Amended Complaint was one that appeared for the first time in that pleading: That Britton's actions were taken in retaliation for Crawford-El's exercise of his First Amendment rights in

communicating with the press. In dismissing that claim, the district court held Crawford-El failed to allege "direct" evidence of Britton's unconstitutional motivation. *Crawford-El v. Britton*, 844 F.Supp. 795, 802 (D.D.C. 1994).

The D.C. Circuit heard *en banc* the dismissal of Crawford-El's First Amendment retaliation claim. The Court issued divergent opinions, but its central holding was that to defeat a claim of qualified immunity in a case that turns on an official's alleged impermissible motive, a plaintiff must establish that motive by clear and convincing evidence. 93 F.3d at 821-23. The Court went on to hold that plaintiff is not entitled to discovery to carry his burden unless he can also show, through evidence that he possesses, that there is a "reasonable likelihood" that the discovery he seeks will "support his specific factual allegations concerning the" official's impermissible motive. 93 F.3d at 841 (Ginsburg opinion). Although the court of appeals thus reaffirmed the rules Britton said were necessary to fully preserve the qualified immunity defense, it vacated the dismissal of the First Amendment claim, to again give Crawford-El a chance to bolster his evidence. 93 F.3d at 829.

This Court granted Crawford-El's petition for a writ of certiorari, on the questions presented therein. 65 U.S.L.W. 3817.

SUMMARY OF ARGUMENT

The doctrine of qualified immunity exists to promote effective and efficient government by freeing government officials of the distractions, fear and paralysis of personal liability for their official acts. So important is this protection and the interests that it serves that this Court mandated in *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), that an

official's entitlement to it must be determined at the earliest possible juncture. Without an immediate determination of entitlement, officials are subjected needlessly to the costs and demands of discovery in cases in which they may ultimately be found to be immune. Special mechanisms are necessary to allow district courts to make the qualified immunity determination early in accordance with the *Anderson* mandate.

The costs associated with civil actions against government officials are particularly high when the subjective intent of the defendant official is an element of plaintiff's claim. Subjective intent is easy to allege and hard to disprove, and as the Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), inquiry into the motivation of the defendant may entail far-ranging discovery into the affairs of the defendant and the deposing of numerous other government officials and colleagues, thus bringing them into the inefficiency equation. In *Crawford-El*, the D.C. Circuit appropriately addressed these increased costs by requiring the plaintiff to come forward with clear and convincing evidence of motive in order to defeat the defendant official's entitlement to qualified immunity. This standard not only appropriately meets the concerns raised by claims encompassing subjective intent, but is also identical to the standard already accepted by this court for use in similar tort causes of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)(clear and convincing standard to be used in libel action against public official). This Court should affirm the D.C. Circuit's application of a clear and convincing evidence standard in § 1983 and *Bivens* actions.

If this Court does not adopt the clear and convincing evidence standard promulgated by the *Crawford-El* decision, it should endorse the use of a heightened pleading standard in § 1983 and *Bivens* actions. An official's entitlement to

qualified immunity must be determined at the earliest possible stage of the litigation. In order to carry out this mandate, district courts must be furnished with enough facts to make the determination. This requires that plaintiffs set forth a statement of the events and occurrences giving rise to their claim. This requirement does not run afoul of the pleading requirements contemplated by the Federal Rules of Civil Procedure and is appropriate and necessary if district courts are to follow this Court's mandate and determine entitlement to qualified immunity at the earliest possible opportunity.

ARGUMENT

MEANINGFUL APPLICATION OF THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES THE COURTS' USE OF SOME FORM OF HEIGHTENED PROCEDURAL PROTECTION.

A. The District of Columbia Circuit's clear and convincing evidence standard is an effective means of accomplishing the policies underlying qualified immunity.

For fifteen years, the test for qualified immunity of government officials has turned on a purely objective standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Hundreds, perhaps thousands of state and local government officials have relied on this simple but significant test. Crawford-El's request that this Court substantially loosen the pleading burden imposed on those

suing government officials threatens to dramatically increase the burdens that litigation imposes on those who have chosen to carry out critical governmental functions. This Court should endorse the D.C. Circuit's clear and convincing evidence standard.

The modern qualified immunity calculus protects officials from the "general costs of . . . the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterring able people from public service." *Harlow*, 457 U.S. at 816. It is also devoid of any subjective element, because "[j]udicial inquiry into subjective motivation . . . may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 816-817. Fishing expeditions, seeking to find some shred of evidence to support a sincerely-held but baseless belief, can be peculiarly disruptive of effective government. *Id.* Indeed, the need to ensure that government can continue to function has led this Court to permit government officials who have been denied qualified immunity following pre-trial dispositive motions to take multiple appeals even before being faced with the burdens of trial on the merits. *Behrens v. Pelletier*, 116 S.Ct. 834, 840 (1996).

The circuits in which the amici appear have responded to the challenge of effectively protecting qualified immunity by using some form of heightened procedural protection, whether by imposing on plaintiffs a requirement of pleading a complaint with heightened specificity, *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995), *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) and *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); requiring a fact-specific reply to an answer asserting qualified immunity, *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995)(en banc); or as in the case of the D.C. Circuit, experimenting with different burdens of

persuasion, *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431 (1987) and *Crawford-El*. Each method recognizes the truism that it is easy to allege a generalized complaint against a state or local official who made a decision the plaintiff does not like.

The case before the Court involves a claim in which the alleged subjective, retaliatory motive of an official is an element of the plaintiff's cause of action. The rule in *Harlow* sprang from analogous claims, involving allegations that senior aides and advisors of the President of the United States conspired against and for retaliatory reasons terminated plaintiff Fitzgerald, a former employee of the Department of the Air Force whose loyalty to the administration was questioned. 457 U.S. at 802. In spite of years of discovery, the Court described the evidence that supported Fitzgerald's claims as "inferential." 457 U.S. at 803. *Harlow* thus stands as a principal example of the waste of officials' time and resources that results when they are required to proceed with discovery in cases in which they are ultimately found entitled to qualified immunity.[1]

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[1] This scenario is not uncommon. *See, e.g., Peppers v. Coates*, 887 F.2d 1493 (11th Cir. 1989). There an arrestee filed a civil rights action against Secret Service agents complaining of constitutional violations in connection with his arrest. The complaint was filed in 1985. It survived a motion for dismissal, or in the alternative, summary judgment and the plaintiff proceeded with discovery. It was only after discovery that the defendants were able to file motions for reconsideration of the request for summary judgment. The district court ultimately denied them summary judgment. 887 F.2d at 1495. Four years after suit was initiated, the Eleventh Circuit determined defendant Coates was entitled to qualified immunity. *Id.* at 1499. The case of *Turner v. Scott*, 119 F.3d 1425 (6th Cir. 1997), is similar. There, an arrestee sued a police officer, among others, for failing to prevent another officer from using excessive force. Turner filed suit in 1994 and amended her complaint, which survived various motions to dismiss. After extensive discovery, the trial court denied the officer's motion for summary judgment in which he asserted qualified immunity. Over two years after the suit was initially filed, the Sixth Circuit held the officer was entitled to summary judgment on the basis of qualified immunity. 119 F.3d at 430. *Metlin v. Palastra*, 729 F.2d 353 (5th Cir. 1994), is also illustrative. Therein, the defendants were denied motions to dismiss and after substantial discovery, sought dismissal or summary judgment on the basis of absolute or qualified immunity. The trial court denied the motion and the Fifth Circuit reversed, holding that the plaintiffs had not even identified the violation of clearly established law. 729 F.2d at 356. But by that time the attention of the defendant officers and their department, which should be focused on protection of the public, had instead been directed to litigation for nearly three years. *Crawford-El* asks this Court to announce a rule that would sanction such distractions.

Such discovery violates officials' right to qualified immunity, a right that is effectively lost if a case is erroneously permitted to go forward, whether for purposes of discovery or trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This right is not susceptible to exceptions. It "reflects a balance that has been struck 'across the board.'" *Anderson v. Creighton*, 483 U.S. 632, 642 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982)). Thus, government officials are no less entitled to the effective enforcement of their right to qualified immunity in unconstitutional motive cases than they are when motive is not an element. And in unconstitutional motive cases, the need for rigorous protection of qualified immunity is all the more great. Unconstitutional motive is "easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821 (citations omitted).

Courts are also familiar with the pre-trial application of the D.C. Circuit's evidentiary standard in cases involving a defendant's state of mind. This Court has addressed the application of such a standard at the summary judgment stage in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Anderson* was a libel suit brought by a public official, thus involving the *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964), clear and convincing standard. The Court remanded *Anderson* with directions that ruling on the defendant's motion for summary judgment be guided by the *New York Times* standard. 477 U.S. at 257. The Court admonished that the mere fact that the defendant's state of mind was at issue did not preclude summary judgment on the defendant's behalf. 477 U.S. at 256.

Petitioner and amici in support thereof argue that the district court's standard will permit meritorious claims to go without redress. This is actually an attack against qualified immunity, for it is a possibility that exists regardless of the evidentiary standard applied. Qualified immunity is a legal defense that provides immunity from suit, providing "ample room for mistaken judgments." *Malley v. Briggs,* 475 U.S. 335, 343 (1986). Because it is just that, an immunity, it can free an official from a lawsuit regardless of whether "he acted wrongly." *Richardson v. McKnight,* 117 S.Ct. 2100, 2103 (1997) (*citing Wyatt v. Cole,* 504 U.S. 158, 171-72 (1992)).

Contrary to petitioner's suggestion, and the suggestions of amici in support thereof, it is not enough to point to the strict enforcement of summary judgment standards for the proposition that officials' entitlement to qualified immunity is already adequately protected. That premise was implicitly rejected each time the Court said that officials could cut off pretrial procedures in ways not normally available to defendants. *See,* e.g., *Behrens, supra* (immediate, multiple appeals of denials of qualified immunity permitted). The need for such special rules should be apparent from the limitations contained in the usual discovery procedures. For example, while courts may use Rule 56(f) to preclude discovery and weed out meritless claims, the rule permits a court to refuse to grant summary judgment until discovery is had, and contains no explicit restriction of discovery in cases in which qualified immunity is asserted.

Therefore, while the courts' faithful adherence to Rule 56, including subpart (f), and caselaw surrounding the application of the Rule may be entirely compatible with the goals of qualified immunity, it alone will not ensure that a defendant official's right to qualified immunity is achieved.

Weighed against this, the burden on the states and their officials in defending against civil rights suits is real. In his opinion concurring in the judgment in *Clinton v. Jones,* 117 S.Ct. 1636, 1652 (1997), Justice Breyer noted that the number of civil rights lawsuits filed annually in the federal district courts between 1960 and 1995 has increased four fold, from under 60,000 to about 240,000, with a corresponding increase in the number of federal district court judges, from 233 to about 650. He further notes that "the time and expense associated with both discovery and trial have increased," and that "an increasingly complex economy has lead to increasingly complex sets of statutes, rules and regulations, that often create potential liability, with or without fault." *Id.* In his concurring opinion in *Crawford-El,* Judge Siberman noted that by 1985, only 30 *Bivens* suits out of 12,000 resulted in a monetary award for the plaintiff. 93 F.3d at 838.

In view thereof, the amicus ACLU simply misses the point when it suggests governments indemnify employees for damages owed, such that the need for vigorous enforcement of qualified immunity is somehow diminished. Whether all governmental entities indemnify their employees is not clear. And of those that do, such indemnity exists by the grace of their respective legislative bodies. The indemnity may cease to be at any time. Qualified immunity also precludes much more than potential damage awards – it precludes the distraction of public officials from their duties, enhances the vigorous exercise of their official discretion, and avoids the inhibition of those willing to serve their government from

entering public service. Given a complex economy that has lead, at least in part, to complex laws and overburdened courts and public resources, preserving the time, energy and talent of government officials through the effective enforcement of qualified immunity is vital to the operation of government.

Nowhere are the policies underlying qualified immunity more starkly displayed than in the context of inmate civil rights lawsuits. The National Center for State Courts studied the profile of inmate § 1983 litigation in 1992 in the nine states[2] that have nearly 50% of the nation's § 1983 litigation. Hanson & Daley, *Challenging the Conditions of Prisons and Jails*, Department of Justice, Bureau of Justice Statistics (1995). The overwhelming majority of prisoners won nothing. Less than one-half of one percent resulted in a favorable verdict for the prisoner. *Id.* at 36.

Between 1990 and 1995, the number of inmates in federal and state prisons rose by 43% and now exceeds one million. Report of Department of Justice (August 7, 1997), and Corrections Yearbook (1995). Prison operation demands the exercise of discretion in the face of extraordinary and competing demands: growing inmate populations, scarce resources, and society's goals for incarceration. As recently as *Lewis v. Casey,* this Court has recognized the wide discretion to which prison officials are entitled, if exercised within the bounds of the Constitution. 116 S.Ct. 2174, 2185 (1996). They are due this discretion in part because of the "strong considerations of comity" owed by the federal courts to the States. *Id.* (*citing Preiser v. Rodriguez,* 411 U.S. 475, 492 (1973)).

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[2]Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania and Texas.

The D.C. Circuit's clear and convincing evidence standard is a measured response that effectively protects the discretion of such officials, in addition to effectuating the other goals of qualified immunity.

B. Alternatively, this Court should address the issue left open in *Leatherman v. Tarrant County Narcotics Unit,* 507 U.S. 163 (1993), confirming that its qualified immunity jurisprudence requires, at a minimum, a heightened pleading standard in cases involving individual government officials.

1. Heightened pleading is necessary so that the district court can make an expedient determination of defendants' entitlement to qualified immunity as mandated by this Court.

This Court has instructed the lower federal courts that the availability of the defense of qualified immunity is to be determined at the earliest possible stage of a litigation. *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987). In order to comply with that mandate, many of those courts have required something more than the generalized allegation that Crawford-El made. To preclude the courts from imposing that requirement would effectively prevent them from complying with the *Anderson v. Creighton* mandate and would thus prevent government officials in the amici states from being relieved at the earliest possible date from the

burdens and distractions imposed by claims that are so easily made.[3]

If district courts are to make the qualified immunity determination with the expedience required by *Anderson*, they must be informed by specific, concrete facts outlining the claim in the plaintiff's complaint. This heightened pleading standard is necessary because without such facts, an early qualified immunity determination is at best not fully informed, and at worst, impossible. The end result is an erroneous determination, if not a total failure to make the determination, and in either case may subject the defendant officials to suit, needlessly taking their attention and energies away from important duties. These are precisely the types of inefficiencies in government that the qualified immunity doctrine was designed to prevent. *Siegert*, 500 U.S. at 232-33.

All federal circuits have, at some time, recognized the need for a statement of specific facts outlining § 1983 claims and have required the plaintiff to set out those facts.[4] This

[3]This is the reason that another suggestion of the amicus ACLU fails. The ACLU suggests that officials' entitlement to qualified immunity is protected by their ability to file pre-discovery motions for summary judgment. Officials should not be required to guess what a plaintiff means in a non-specific complaint and then engage in investigation, gather documents, interview witnesses, and prepare affidavits in order to prepare a motion for summary judgment. That does not protect officials from the burdens of litigation. And it places officials in the impossible position of attempting to assert their entitlement to qualified immunity without knowledge of the alleged facts on which a claim is based.

[4]*Krohn v. U.S.*, 742 F.2d 24, 31-32 (1st Cir. 1984); *Salahuddin v. Cuomo*, 861 F.2d 40, 43 (2d Cir. 1988); *Darr v. Wolfe*, 767 F.2d 79, 80 (3d Cir. 1985); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990); *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995)(en banc); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Patton v.*

Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) has not diminished the need for heightened pleading in § 1983 claims against officials with potential qualified immunity from suit. The danger of distracting public officials from their duties with meritless claims and the concern that it will be impossible to attract quality candidates to state office remain. Qualified immunity remains a vital defense, the viability of which is destroyed if defendants' entitlement to it is not determined at the outset of the action. Without heightened pleading the qualified immunity determination cannot be made and the defense is lost.

The Sixth Circuit recognized this continuing need for heightened pleading even in the wake of this Court's *Leatherman* decision in its decision in *Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995). Faced with propriety of a heightened pleading standard in a suit against a public official who asserted qualified immunity, the Sixth Circuit aptly noted that failure to impose such a standard at the pleading stage would "eviscerate the substantive rights afforded by the qualified immunity defense" and render the "promise of early exit" from suit "empty." *Veney*, 70 F.3d at 922. Other courts have also continued to apply the heightened pleading standard post-*Leatherman*. *See, Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1991); *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995); *Edgington v. Missouri Dep't of Corrections*, 52

Przybylski, 822 F.2d 697, 701 (7th Cir. 1987)(requiring factual specificity of personal involvement when head of corrections department sued); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989) *cert denied* 493 U.S. 1088 (1990); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991)(adopting heightened pleading standard in cases where subjective intent is element of claim); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. den.* 507 U.S. 987 (1993); *Hunter v. District of Columbia*, 943 F.2d 69, 76 (D.C. Cir. 1991).

F.3d 777, 780 (8th Cir. 1995). Because heightened pleading is necessary to the preservation of the qualified immunity defense, this Court should specifically affirm its use in § 1983 and *Bivens* actions against government officials potentially entitled to assert the defense.

2. Rules 8 and 9(b) do not preclude the use of a heightened pleading standard in cases where government officials' entitlement to qualified immunity must be determined.

The requirement of a heightened pleading standard in actions where the defense of qualified immunity is raised is consistent with the Federal Rules of Civil Procedure. At work here is the tension between the Rules Enabling Act and Federal Rules of Civil Procedure 8 and 9(b). Rules 8(a)(2) and 8 (e)(1) are said to establish a requirement of "notice pleading" in federal court. Rule 9(b) expressly requires particularity in pleading actions alleging fraud and mistake.[5] Utilizing the doctrine of *expressio unius est exclusio alterius*, the Court in *Leatherman* read Rule 9(b) as precluding a heightened pleading standard beyond that required by Rule 8 in a § 1983 claim where the defendant was not entitled to qualified immunity. *Leatherman*, 507 U.S. at 168. But the *Leatherman* Court did not extend this preclusion to cases involving the assertion of the qualified immunity defense by

[5]Notably the historical purpose of the Rule 9(b) pleading requirement is identical to justifications asserted for heightened pleading in § 1983 actions. Allegations of fraud and mistake are frequently advanced lightly for their nuisance value or settlement value with little hope they will be successful. 5 Wright & Miller Federal Practice and Procedure Civil 2d § 1296 (1990). Rule 9(b) operates to stop plaintiffs from engaging in costly and time consuming discovery on a groundless claim which is designed only to increase the likelihood defendant will settle in order to avoid the costs of discovery. *Id., citing Zuckerman v. Harnischfeger Corp.*, 591 F. Supp. 112 (D.N.Y. 1984).

government officials. *Id* at 166-67. Rather, the Court left open the question of whether its qualified immunity jurisprudence would require the application of a heightened pleading standard in such cases despite the provisions of Rules 8 and 9(b). *Id.*

As a preliminary matter, the preclusive effect of Rule 9(b) need not even be addressed to determine the requisite pleading standard in § 1983 claims against government officials who enjoy qualified immunity. Even the liberal standard set forth in Rule 8 requires the plaintiff to state his claim with enough specificity to make a determination of the qualified immunity issue. Rule 8(a)(2) requires the plaintiff to set forth a short plain statement of the claim showing he is entitled to relief. The "notice pleading" standard set out by Rule 8 does not entirely relieve plaintiff of any burden to plead facts entitling him to relief. Plaintiff must make a statement of the claim which will give defendant notice of the grounds upon which the claim rests. *Conley v. Gibson*, 355 U.S. 41 (1957). Implicit in this holding is the statement that Rule 8 envisions more than mere conclusory allegations; it calls for a "statement of the circumstances, occurrences and events in support of the claim presented." *See* 5 Wright & Miller, Federal Practice and Procedure Civil 2d § 1202 (1990) (*quoting* Advisory Committee's 1955 Report). *Accord, Ascon Properties, Inc. v. Mobil Oil* Co., 866 F.2d 1149, 1155 (9th Cir. 1989), and *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988).

Moreover, the adequacy of a pleading is not universal, it is case specific. As the Tenth Circuit noted in *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386 (1980), Rule 8(a)(2) calls for notice to the defendant, but what constitutes notice changes from case to case depending on the complexity of the claim. In cases involving defendants who enjoy qualified immunity, no case can be

stated unless plaintiff sets forth facts demonstrating an absence of immunity. This follows from the Court's prior jurisprudence on the qualified immunity issue detailing that it is immunity from the processes of litigation such as discovery to which government officials are entitled. *Anderson v. Creighton*, 483 U.S. at 646, *Seigert v. Gilley*, 500 U.S. at 232-33. A complaint that complies with Rule 8 allows plaintiff to commence discovery to flesh out his claim; therefore, to accommodate the right to qualified immunity from discovery as well as trial, a well-pleaded complaint under Rule 8 should be required to demonstrate that the defendant is not entitled to qualified immunity and, therefore, discovery is appropriate. This does not redefine Rule 9(b); rather it is merely a statement of the definition of a well pleaded § 1983 complaint against government officials. This is precisely the reasoning followed by Judge Higginbotham in his well reasoned concurrence in *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (J. Higginbotham concurring).

Even if the Court does not read the pleading requirement of Rule 8(a)(2) as requiring a statement of facts negating defendant's right to qualified immunity, Rule 9(b) does not preclude requiring a heightened pleading standard in § 1983 claims against government officials. It is true that federal rules enjoy a presumptive validity. *Hanna v. Plummer*, 380 U.S. 460, 471 (1965). However, the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Entitlement to qualified immunity is a substantive right. *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818. As argued above, heightened pleading standards are necessary to protect this right and the Federal Rules of Civil Procedure cannot eviscerate the right to qualified immunity by prohibiting the use of such standards in § 1983 and *Bivens* actions.

Justice Kennedy argued persuasively on this point in his concurrence in *Siegert v. Gilley*, 500 U.S. 226, 235 (1995). There he pointed out that the immunity defense prevails over the rules.

> A heightened pleading standard is a necessary and appropriate accommodation... [I]t is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b)... But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine. The substantive defense of immunity prevails.

A heightened pleading standard is not only necessary in cases where the defense of qualified immunity is raised, it is compelled by the Court's prior jurisprudence on the qualified immunity issue. This Court should definitively rule that in § 1983 or *Bivens* actions asserting the violation of a constitutional right, a plaintiff is properly required to meet a heightened pleading standard setting forth in the Complaint specific facts supporting his or her claims.

CONCLUSION

For the reasons stated, the decision of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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